(8)

No. 92-1196-CFY
Status: GRANTED

Title: Waldemar Ratzlaf and Loretta Ratzlaf, Petitioners
v.
United States

Docketed:
January 14, 1993

Court: United States Court of Appeals for the Ninth Circuit

Counsel for petitioner: Ryan,John Duncan, Kent,Christopher H., LaCheen,Stephen R.

Counsel for respondent: Solicitor General, Solicitor General

1-4-93 ext til 1-19-93, J. O'Connor.

Entry	Date	Note	Proceedings and Orders
1	Dec 28 1992	G	Application (A92-499) to extend the time to file a petition for a writ of certiorari from January 4, 1993 to January 19, 1993, submitted to Justice O'Connor.
2	Jan 4 1993		Application (A92-499) granted by Justice O'Connor extending the time to file until January 19, 1993.
3	Jan 14 1993	G	Petition for writ of certiorari filed.
5	Feb 16 1993		Order extending time to file response to petition until March 18, 1993.
6	Mar 16 1993		Order further extending time to file response to petition until April 19, 1993.
7	Mar 23 1993		Brief of respondent United States filed.
8	Mar 24 1993		DISTRIBUTED. April 16, 1993
10	Apr 19 1993		REDISTRIBUTED. April 23, 1993
11	Apr 26 1993		Petition GRANTED.
			**********
13	May 25 1993		Order extending time to file brief of petitioner on the merits until July 1, 1993.
15	Jun 17 1993		Order extending time to file brief of petitioner on the merits until July 20, 1993.
16	Jul 20 1993		Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
17	Jul 20 1993		Joint appendix filed.
18	Jul 21 1993		Brief of petitioners Waldemar & Loretta Ratzlaf filed.
19	Aug 4 1993		Record filed.
		*	Partial proceedings United States Court of Appeals for the Ninth Circuit.
20	Aug 20 1993		Brief of respondent United States filed.
21	Sep 1 1993		Record filed.
		*	Original proceedings United States District Court for the District of Nevada.
22	Sep 8 1993		CIRCULATED.
23	Sep 10 1993		SET FOR ARGUMENT MONDAY, NOVEMBER 1, 1993. (3RD CASE).
24	Sep 22 1993	X	Reply brief of petitioners filed.
25	Nov 1 1993		ARGUED.

(1)

92-1166

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JANUARY TERM, 1992

WALDEMAR RATZLAF and
LORETTA RATZLAF,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether knowledge of the legality of one's actions is an element of the criminal offense of structuring cash transactions in violation of 31 U.S.C. § 5324(3)?

2. Does this court's decision in Cheek v. United States, ___ U.S. ___, 111 S. Ct. 604, 112 L.Ed. 2d 617 (U.S. 111, June 8, 1991), apply to the structuring statute promulgated in 31 U.S.C. § 5324?

PARTIES

1. United States of America.
2. Waldemar Ratzlaf.
3. Loretta Ratzlaf.

All of the parties to this proceeding are named in the caption. Waldemar and Loretta Ratzlaf (Petitioners) were defendants in the District Court and appellants in the Court of Appeals. No party is a corporation requiring a listing of affiliates pursuant to Rule 29.1.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioners, Loretta Ratzlaf and Waldemar Ratzlaf, respectfully pray that a writ of certiorari be issued to review the order and judgment of the United States Court of Appeals for the Ninth Circuit issued on October 6, 1992.

OPINION BELOW

A copy of the opinion issued by the United States Court of Appeals for the Ninth Circuit in the case of United States v. Ratzlaf, 976 F.2d 1280 (9th Cir. 1992), is attached as Appendix A.

JURISDICTION

On October 6, 1992, the United States Court of Appeals for the Ninth Circuit entered its order and judgment affirming the judgment of the United

States District Court for the District of Nevada.

This court has jurisdiction to review by certiorari the decision of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 31 U.S.C. § 5313 provides that:

> (a) When a domestic financial institution is involved in a transaction for the payment, receipt, or transfer of United States coins or currency (or other monetary instruments the secretary or treasury prescribes), in an amount, denomination, or amount and denomination, or under circumstances the secretary prescribes by regulation, the institution and any other participant in the transaction the secretary may prescribe shall file a report on the transaction at the time and in the way the secretary prescribes. A participant acting for another person shall make the report as the agent or bailee of the person and identify the person for whom the transaction is being made.

(b) The Secretary may designate a domestic financial institution as an agent of the United States Government to receive a report under this section. However, the Secretary may designate a domestic financial institution that is not insured, chartered, examined, or registered as a domestic financial institution only if the institution consents. The Secretary may suspend or revoke a designation for a violation of this subchapter or a regulation under this subchapter (except a violation of section 3515 of this title or a regulation prescribed under section 5315), section 411 of the National Housing Act (12 U.S.C. 1730d), or section 21 of the Federal Deposit Insurance Act (12 U.S.C. 1829b).

(c)(1) A person (except a domestic financial institution designated under subsection (b) of this section) required to file a report under this section shall file the report --

(A) with the institution involved in the transaction if the institution was designated;

(B) in the way the Secretary prescribes when the institution was not designated; or

(C) with the Secretary.

(2) The Secretary shall prescribe --

(A) the filing procedure for a domestic financial institution designated under subsection (b) of this section; and

(B) the way the institution shall submit reports filed with it.

(Pub.L. 97-258, Sept. 13, 1982, 96 Stat. 996.)

Title 31 U.S.C. § 5322 provides that:

(a) A person willfully violating this subsection or a regulation prescribed under this subsection (except section 5315 of this title or a regulations prescribed under section 5315) shall be fined not less than $250,000.00, or imprisonment [sic] not more than five years, or both.

(b) A person willfully violating this subchapter or a regulation prescribed under this subchapter (except section 5315 of this title or a regulation prescribed under section 5315), while violating another law of the United States or as part of a pattern of any illegal activity involving more than $100,000 in a 12-month period, shall be fined not more than

$500,000, imprisoned for not more than 10 years, or both.

(c) For a violation of section 5318(a)(2) of this title or regulation prescribed under section 5318(a)(2), a separate violation occurs for each day the violation continues and at each office, branch, or place of business at which a violation occurs or continues.

(As amended Pub.L. 98-473, Title II, § 901(b), Oct. 12, 1984, 98 Stat. 2135; Pub.L. 99-570, Title I, §§ 1356(c)(1), 1357(g), Oct. 27, 1986, 100 Stat. 3207-24, 3207-26.)

Title 31 U.S.C. § 5324 provides that:

No person shall for the purpose of avoiding the reporting requirements of section 5313(a) with respect to such transaction --

(1) cause or attempt to cause a domestic financial institution to fail to file a report required under section 5313(a);

(2) cause or attempt to cause a domestic financial institution to file a report required under section 5313(a) that contains a material omission or misstatement of fact; or

(3) structure or assist in structuring or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions.

(Added Pub.L. 99-570, Title I, § 1354(a), Oct. 27, 1986, 100 Stat. 3207-22.)

STATEMENT OF THE CASE

On November 20, 1990, a Nevada Grand Jury returned a six count indictment which charged Waldemar Ratzlaf, Loretta Ratzlaf and Ron Hunt, Defendants, with:

1. Conspiracy in violation of 18 U.S.C. 371 (count 1).

2. Structuring of financial transactions to avoid currency reporting requirements, in violation of 31 U.S.C. 5324(3) and 31 U.S.C. 5322(a), (counts 2, 3, 4 and 5); and

3. Interstate travel in aid of racketeering in violation of 18 U.S.C. 1952(a)(3), (count 6).

On April 24, 1991, following a lengthy trial, the jury returned a guilty verdict against Waldemar Ratzlaf on all counts. The jury found Loretta Ratzlaf guilty on counts 1 and 6, conspiracy, in violation of 18 U.S.C. § 371 and interstate travel in aid of racketeering in violation of 18 U.S.C. § 1952(a)(3), respectively. Loretta Ratzlaf was found innocent on the four substantive counts of structuring financial transactions to avoid currency reporting requirements. Mr. Hunt was found not guilty on all counts.[1]

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[1]The Ninth Circuit Court of Appeals in their opinion stated in a footnote that Mr. Hunt was convicted on the conspiracy count, two structuring counts, and the interstate travel

On July 8, 1991, sentencing proceedings were held before the Honorable Edward C. Reed, Jr. United States District Judge. Mr. and Mrs. Ratzlaf's cases were consolidated for appeal on November 26, 1991. Petitioners filed their brief in support of appeal on December 20, 1991. Petitioners argued that this court's decision in Cheek v. United States, ___ US ___, 111 S.Ct 604, 112 L.Ed 2d 617 (1991), effectively overruled the Ninth Circuit Court of Appeal's holding in United States v. Hoyland, 914 F.2d 1125 (9th Cir. 1990). Petitioners also argued that knowledge of wrong doing was

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charge. This is inaccurate. Mr. Hunt was found innocent on all counts and does not join in this Petition for Writ of Certiorari.

a requirement under 31 U.S.C. §§ 5324 and 5322.

FACTUAL BACKGROUND

During the criminal tax investigation of Petitioners arising from an income tax audit, their representative and accountant delivered the evidence, which consisted of cashier check stubs and carbon copies, to the IRS. Petitioners did this because they believed they had done nothing wrong with regard to those transactions. Then and only then did the government begin to investigate the events which occurred on October 26 through October 28, 1988.

On October 26, 1988, Petitioners traveled to Nevada in order to pay off a $160,000 gambling marker. In the course of paying their gambling debt, Petitioners purchased eight cashiers

checks from five different banks. It was these transactions which gave rise to the indictments and conviction of Petitioners.

It was undisputed at trial that Petitioner Waldemar Ratzlaf knew banks were required to file something and that Petitioners engaged in transactions in a way as to prevent the banks from filing CTR. The Petitioners, however, asserted as a defense the fact that they did not know their actions were illegal. To rebut Petitioners' defense, the government argued that Petitioners' knowledge of the illegality of their actions was irrelevant. There was no evidence that the monies used to purchase the cashiers checks involved in this case was money obtained illegally or through an illegal source. In fact,

the evidence presented reflects the money came from legally sanctioned gambling in Nevada.

The instructions given to the jury, however, rendered Petitioners' lack of knowledge, with respect to the criminality of their actions, irrelevant. The instructions also made irrelevant the fact that the money used to purchase the cashiers checks was not obtained through criminal activities.

The facts of this case do not give rise to a situation in which the legislators of 31 U.S.C. § 5324 intended, would result in a conviction for structuring. However, due to the present state of the structuring laws, established in United States v. Scanio, 900 F.2d 485 (2nd Cir. 1990); and Hoyland, supra. Petitioners' actions

resulted in their conviction. This was the result despite the fact that there was no underlying illegality attached to Petitioners actions and that the court make it unnecessary to show Petitioners knew their actions were prohibited. Therefore, armed with a favorable jury instruction based on the decision of Scanio, supra, and Hoyland, supra, the prosecutor's task in obtaining a conviction against Petitioners was as the court in United States v. Aversa, 762 F.Supp. 441 (D.N.H. 1991) found, no more difficult than "shooting fish in a barrel." It is for this reason that the Petitioners' request that this court grant its Petition for Writ of Certiorari.

PETITIONERS' REQUEST THE CONSIDERATION OF THIS PETITION FOR WRIT OF CERTIORARI BE DEFERRED

To date, all circuits that have addressed the question of whether the term "willfully," as used in 31 U.S.C. § 5322(a) and applied to 31 U.S.C. § 5324(3), requires the government to prove knowledge on the part of a defendant have found such a showing unnecessary. Scanio, supra; Hoyland, supra; United States v. Dashney, 937 F.2d 532 (10th Cir.), cert. denied, 112 S.Ct. 402 (1991); United States v. Brown, 954 F.2d 1563 (11th Cir. 1992); United States v. Rogers, 962 F.2d 342 (4th Cir. 1992). (Petitioners will refer to the Scanio, supra, case for the proposition put forth in the above cited cases, that knowledge of the crime of structuring is not an element of

structuring); but see, Cf. United States v. Sturman, 951 F.2d 1466 (6th Cir. 1991).

The First Circuit in United States v. Donovan, ___ F.2d ___, 1992 WL 18217 (1st Cir. (N.H.)), 60 USLW 2530 (1992), followed the rationale of the Scanio case. Following that decision, however, the First Circuit granted a petition to re-hear en banc the Donovan case. In granting the petition, the court withdrew the panel opinion and judgment of the appellate court. The First Circuit consolidated with Donovan the cases of Aversa, supra, and United States v. Mento, 762 F.Supp. 441 (D.N.H. 1991). The en banc re-hearing was granted to determine the meaning of the term "willfully" as that term is used in 31 U.S.C. § 5322 and, by derivation

therefrom, as that term applied to (1) violations of the Domestic Currency Transaction Reporting Law, 31 U.S.C. § 5313, and (2) violation of the Anti Structuring Law, 31 U.S.C. § 5324. The argument was heard in September of 1992. No decision has been rendered.

Petitioners requested additional time to file their petition for certiorari until the First Circuit rendered its opinion in Donovan. Petitioners' motion for extension of time was filed on December 23, 1992. The motion had not been ruled as of the filing of this petition. Petitioners, therefore, respectfully request that this court defer the consideration of the petition until such time as the First Circuit renders an opinion in the Donovan, Aversa, and Mento case.

On occasion, it is proper for this court to delay its granting of certiorari. See, e.g. Keney v. New York, 388 US 440 (1967).

REASONS FOR GRANTING CERTIORARI

1. Granting of Petitioners' Writ of Certiorari is Proper in This Case, So That This Court's Holding in Cheek Can Be Clarified.

Petitioners' interpretation of the term "willfully" is not only born out by the legislative history of § 5322, discussed infra, but is supported by this court's interpretation of the identical provision as it is used in criminal tax prosecutions. This court held in Cheek, supra, that "willfulness" requires the intentional violation of a known legal duty. The Cheek decision explained that the common law presumption that every person knows the law, was based on the notion that the

law is definite and knowable, but that the "proliferation of statutes and regulations has sometimes made it difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed by the tax law." Id. at 609. The special treatment of criminal tax offenses by this court was largely due to the complexity of the tax laws." Id.

Petitioners, in their appeal, argued that Cheek, supra, applied to prosecutions for violations of 31 U.S.C. § 5324, and therefore, effectively overruled Scanio, supra. The Ninth Circuit disagreed, holding the Cheek decision did not apply to the structuring violations. The court based its decision on the finding that Cheek was limited to criminal tax violations.

The Ninth Circuit's holding in Petitioner's case is in conflict with this court's rationale in Cheek, thus making granting of certiorari proper.

Further, there is a split in the circuits concerning the application of the Cheek. The application of this court's decision in Cheek has been adopted in other than the criminal tax context. Sturman, supra (Cheek was applied to the law governing failure to maintain records of foreign currency transactions); Wheeler v. McKinley Enterprises, 937 F.2d 1158 (6th Cir. 1991) (holding the definition applied to violations of 29 U.S.C. § 632(a)(1), dealing with penalties for age discrimination); Aversa, supra, (the Cheek definition was applied to the same structuring statutes that Petitioners

were convicted of violating); United States v. Moran, 762 F.Supp. 441 (D.N.H. 1991) (the Cheek definition of "willfulness" was applied in a criminal copyright infringement case).

In Sturman, supra, the Sixth Circuit specifically recognized that the holding in Cheek was applicable to the "willfulness" requirements of § 5322 of Title 31. The defendant in that case was charged with violation of the foreign currency reporting requirements (§ 5314), which is located in the same subchapter of Title 31 (Chapter 53, Subchapter 11) as the structuring section involved in Petitioners' case (§ 5324). Violations of § 5314 become a criminal offense pursuant to § 5322 only when it can be shown a defendant

violated a known legal duty. The Sturman court held:

> Counts XII-XV charged Ruben Sturman with willfully failing to maintain records and file reports as required by 31 U.S.C. § 5314 (1982).... Ruben Sturman objects to his conviction on these counts because he believes the prosecution failed to show that he was aware of the form 90-22.1 filing requirements. In Cheek v. United States, ___ US ___, 111 S.Ct. 604, 610, 112 L.Ed 2d 617 (1991), the Supreme Court established that the test for statutory willfulness is 'voluntary intentional violation of a known legal duty.'

951 F.2d at 1476.

This confusion and split of authority amongst various courts, concerning the application of the Cheek decision, necessitates clarification of that decision by this court.

2. The Holding in Petitioners' Case is Inconsistent with Congressional Intent.

The present interpretation of the term "willfully" as it is used in § 5322

and applied to § 5324 is inconsistent with the Congressional intent. The legislative history supports the same interpretation of the term "willfully" as this court applied to that term in Cheek, supra. Prior to the enactment on October 27, 1986 of 31 U.S.C. § 5324, courts interpreted the word "willfully" in § 5322(a) as requiring knowledge of illegality. See, e.g., United States v. Eisenstein, 731 F.2d 1540, 1543 (11th Cir. 1984); United States v. Granda, 565 F.2d 922, 926 (5th Cir. 1978). Congress did not change the language of § 5322(a) when it enacted § 5324. Thus, unless Congress intended "willfully", as it is used in § 5322(a), to have one meaning when applied to some violations of Title 31 and another when applied to others, the willfulness provision of § 5322(a)

requires knowledge of the illegality of structuring on the part of a defendant.

The legislative history of § 5324 supports this interpretation. Section 5324 was enacted as part of the Anti-Drug Abuse Act of 1986 ("ADAA"). 100 Stat. 3207 (1986). The legislative history of the ADAA is complex. Numerous versions of the ADAA were proposed and debated by the legislature. See 1986 U.S. Code Cong. & Admin. News 5393. The final version of the ADAA has no explanation regarding its provisions. The legislative history consists of reports and hearings accompanying various bills that were not enacted into law.

Two of the reports concerning money laundering contain references to the interpretation of the term "willfully"

as used in § 5322(a). The first report was submitted by the Committee on Banking, Finance & Urban Affairs and accompanied House Bill 5176, the "Comprehensive Money Laundering Provision Act," which contained an anti-structuring provision and a provision changing the word "willfully" in § 5322(a) to "knowingly." H.R. Rep. No. 746,99TH Cong., 2nd Sess. at 1-2, 8 (1986). The report explains that the proposed change from "willfully" to "knowingly" clarifies the state of mind standard under existing law in effect for criminal penalties. Id. at 28-9. According to the report, the law existing at the time § 5324 was being considered required knowledge of illegality for criminal conviction under Title 31.

The second report was submitted by the Committee on the Judiciary and accompanied House Bill 5217, the "Money Laundering Control Act of 1986," which also contained a provision changing "willfully" to "knowingly" in § 5322(a). H.R. Rep. No. 855,99TH Cong., 2nd Sess. at 6-7 (1986). The report explained that courts have construed the word "willfully" in various ways, including as requiring that an act be done with specific intent to violate the law and as requiring that an act be done without grounds for believing it is unlawful. Id. at 21, n. 15. Despite this awareness, however, Congress chose not to change the language of § 5322(a). See 31 U.S.C. § 5322(a).

The legislative history of the structuring statute thus establishes

that Congress was aware that § 5322(a) had been interpreted to require knowledge of the illegality, and did nothing to change the statutes mens rea requirement.

Even if the reports do not affirmatively establish the Congress' intent to require knowledge of illegality, they render the legislative history ambiguous. Given this ambiguity and the ambiguity of the word "willfully," the rule of lenity requires the ambiguity be resolved in favor of Petitioners. See Bifulco v. United States, 447 US 381, 387, 400 (1980); United States v. Bass, 404 US 336, 347-48 (1971). Therefore, the term "willfulness" as used in § 5322 must be interpreted as requiring knowledge of illegality.

3. 31 U.S.C. § 5324 is in the Nature of a Criminal Tax Statute, and Therefore, This Court's Holding in Cheek is in Conflict with the Holding in Petitioners' Case.

If we assume arguendo that the court in Petitioners' case accurately held that the Cheek decision only applies in a criminal tax case, their holding is still flawed. The statute under which Petitioners were convicted is in the nature of a criminal tax statute and is equally as complex and not as well known as the tax statutes. Therefore, the holding in Cheek should be expanded and applied to the complex group of statutes which contain 31 U.S.C. §§ 5324 and 5322 and are tax related statutes.

The Cheek case dealt with a defendant who was charged with willfully failing to file an income tax return and

willfully attempting to evade his income tax in violation of 26 U.S.C. §§ 7203 and 7201. This court held with regard to the term "willful" that:

> The general rule of ignorance of the law or a mistake of law is no defense to a criminal prosecution is deeply rooted in the American legal system. Based on the notion that the law is definite and knowable, the common law presumed that every person knew the law. This common law rule has been applied by the court in numerous cases concerning the criminal statutes.
>
> The proliferation of statutes and regulations has sometimes made it difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed by the tax laws. Congress has accordingly softened the impact of the common law presumption by making specific intent to violate the law an element of certain federal tax offenses. Thus, the court almost 60 years ago interpreted the statutory term "willfully" as used in the federal criminal tax statutes as carving out an exception to the traditional rule. This special treatment of the criminal tax offenses is

> largely due to the complexity of the tax laws.

Cheek, 111 S.Ct. at 609 (citations omitted).

The notion of laws becoming too complex was contemplated as early as the Federalist Papers, in which James Madison wrote:

> It will be of little avail to the people that laws are made of men of their own choice if the laws be so voluminous that they cannot be read, or so coherent that they cannot be understood; if they be repealed or reversed before they are promulgated, or undergo such incessant changes that no man, who knows what the law is today, can guess what it will be tomorrow.

James Madison, Federalist Papers, 1788.

James Madison's conclusions could be no more applicable than to the vast number of statutes which deal with the process of exchanging and engaging in currency transactions.

The appellate court in Petitioners' case found, however, that § 5324(3) is not complex or ambiguous. As a result, the court found the rational in Cheek, as it applies to the complexity of statutes, did not apply in Petitioners' case.

The problem with the Ninth Circuit's analysis of § 5324(3) is that § 5324 is only one of the sections which make up the ADAA, which is equally as complex as the tax laws. This court in Cheek did not determine that the individual statute violated by Mr. Cheek was what was complex, but rather that the tax code was complex. In that same vein, it is not the complexity of § 5324 that is at issue, but rather the complexity of the entire ADAA.

The reasons for requiring a specific intent to violate the law in Petitioners' case, are at least as compelling as those reasons proffered by this court in Cheek. In light of the complexity of the law in the structuring array, reverting to the common law rule that ignorance of the law is no excuse would cause, and did cause, a miscarriage of justice.

It is for the above reasons Petitioners' writ or certiorari should be granted. The granting of the writ is proper so that the application of this court's holding in Cheek can be clarified and because the decision in Petitioners' case is in conflict with this court's decision in Cheek.

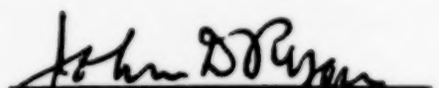
The proper interpretation of the word "willfully" as it is used in the

structuring statute involves an important question of federal law that has not been, but should be, settled by this court. In addition, the decision in Scanio, and the cases that follow it, conflict with this court's decision in Cheek. Those cases also conflict with the decision of the United States District Court for the District of New Hampshire. Aversa, supra. A conflict as to the application of the Cheek decision and whether it is to be strictly applied to tax cases or can be applied to other statutory schemes exists. See Sturman, supra; Wheeler, supra; Moran, supra; Aversa, supra. For these reasons, Petitioners respectfully submit that this case is appropriate for review by this court.

CONCLUSION

For the reasons stated above, Petitioners, Waldemar Ratzlaf and Loretta Ratzlaf, respectfully request this court to grant their petition for writ of certiorari.

JOHN D. RYAN, P.C.



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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. WALDEMAR RATZLAF, Defendant-Appellant.	)	No. 91-10397 D.C. No. CR-N-90-58-ECR OPINION
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. LORETTA RATZLAF, Defendant-Appellant.	)	No. 91-10429 D.C. No. CR-N-90-58-ECR OPINION

Appeal from the United States District Court for the District of Nevada
Edward C. Reed, Jr., Chief Judge, Presiding

Argued and Submitted
July 14, 1992--San Francisco, California

Filed October 6, 1992

Before: J. Clifford Wallace, Chief Judge, and Herbert Y.C. Choy and Cecil F. Poole, Circuit Judges.

Opinion by Judge Poole

SUMMARY

Criminal Law and Procedure/ Criminal Acts/Defenses

Affirming district court judgments of conviction for structuring financial transactions to avoid currency reporting requirements, the court of appeals held that the recent Supreme Court decision in Cheek v. United States did not overrule the Ninth Circuit's holding in United States v. Hoyland that the government had to prove that a defendant knew such structuring was illegal to convict.

Appellants Waldemar and Loretta Ratzlaf were high-time gamblers. To facilitate their enjoyment of such activity, they established lines of credit at numerous casinos in New Jersey and Nevada. Mr. Ratzlaf, a regular customer and a "high roller" at the casinos, bet, won, and lost large amounts of money. A bad night at a Nevada casino made Mr. Ratzlaf lose $160,000. The Ratzlafs tendered payment to the casino in cash because Mr. Ratzlaf did not want the casino to fill out any report of the payment transaction. However, the casino refused to accept cash payment on those terms and informed the Ratzlafs that the casino would be required to fill out a "currency transaction report" since more than $10,000 in currency was involved.

Subsequently, the Ratzlafs obtained various cashiers checks in amounts of less than $10,000 to repay the casino debt. A federal grand jury indicted the Ratzlafs for structuring financial transactions to avoid currency reporting requirements. A jury convicted the Ratzlafs. The Ratzlafs argued that the jury instructions misstated the elements of the crime of structuring financial transactions to avoid the currency reporting requirements.

[1] The court noted that it recently rejected in Hoyland the argument that an individual cannot be convicted of "structuring" unless the government proves that he or she knew such activities were illegal. In so holding, the court agreed with the

Second Circuit's holding to that effect in Scanio. [2] The court rejected the Ratzlafs' argument that the Supreme Court's recent decision in Cheek v. United States overruled Hoyland and Scanio. [3] The court noted that other circuits have rejected the notion that Cheek changes the Hoyland and Scanio conclusions. [4] However, the court disagreed with the New Hampshire district court holding in Aversa that the defendant there could not be convicted of structuring because he did not know that it was illegal. First, the currency structuring and reporting statutes are not "complex" in the sense that the Cheek court used that term in referring to the federal tax laws. [5] Second, the court did not think the rule of lenity applies to the money

laundering statutes. Here, the language of the statute in question was not ambiguous, and even a strict reading of the statute supports, not undercuts, the government's proffered interpretation. [6] The court thus concluded that Hoyland and Scanio rest firmly upon Congress' intent in proscribing structuring. After the 1986 amendments to the statute, one could be prosecuted for violating section 5324(3) if he or she willfully structured transactions. [7] If a defendant knows that the bank must report a currency transaction and then intentionally acts in a way to prevent that, he has acted willfully.

COUNSEL

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C. Hill, Reno, Nevada, for the defendants-appellants.

Jeffrey B. Setness and William M. Welch, Assistant United States Attorneys, Reno,Nevada, for the plaintiff,appellee.

OPINION

POOLE, Circuit Judge:

Defendants Loretta and Waldemar Ratzlaf appealed their convictions for structuring financial transactions to avoid currency reporting requirements, a violation of 31 U.S.C. §§ 5322(a), 5324(3). They argue that Cheek v. United States, 111 S.Ct. 604 (1991), overrules our holding in United States v. Hoyland, 914 F.2d 1125 (9th Cir. 1990), that the government does not have to prove that the defendants knew

structuring is illegal to convict. We have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm.

I

Defendants Waldemar and Loretta Ratzlaf, residents of Portland, Oregon, are gamblers. To facilitate their enjoyment of such activity, they established lines of credit at fifteen casinos of New Jersey and Nevada. Mr. Ratzlaf, a regular customer and a "high roller" at the casinos, bet, won, and lost large amounts of money. The events that led to this case began on October 20th, 1988, at the High Sierra casino in Reno, Nevada. Mr. Ratzlaf had a bad night, losing $160,00 playing blackjack. Fortunately for him, the casino had increased his credit line from $25,00 to $160,000 earlier that day. When the

casino learned about Lady Luck's unkind treatment of Mr. Ratzlaf, it granted him one week to pay back the $160,000 balance.

On October 27, 1988, the Ratzlafs returned to the High Sierra casino carrying enough cash to pay their debt. Shift manager Tony Mercurio informed his boss, casino Vice-President Stephen Allmaras, that Mr. Ratzlaf did not want the casino to fill out any written report of the payment transaction. Allmaras refused to accept cash payment on those terms and informed the Ratzlafs that he would be required to fill out a "currency transaction report" (CTR) since more than $10,000 in currency was involved. Allmaras told Mr. Ratzlaf that he would be happy to accept as an alternative a single cashiers check for

the amount due and suggested to Mr. Ratzlaf that he contact his bank in Oregon to make the necessary arrangements. Allmaras also made available to the Ratzlafs a limousine and assigned employee Ron Hunt to transport them to the local bank that would provide the check.

On October 28, 1988, Hunt escorted the Ratzlafs to several banks in and near Stateline, Nevada and South Lake Tahoe, California. At each bank the Ratzlafs used cash to purchase, or attempt to purchase, cashiers checks in amounts less than $10,000. Armed with the cashiers checks thus obtained, the Ratzlafs returned to the High Sierra casino and submitted them as partial payment on their gambling debt. However, not all of the $160,000 debt

was eliminated. Accordingly, on November 28, 1988, Mr. Ratzlaf gave Ruby Langston, a former employee at a restaurant owned by the Ratzlafs, $5,000 in currency and asked her to purchase a single cashiers check at First Interstate Bank in Portland. On the same day Mr. Ratzlaf also gave Lena Koseniensky $5,000 in currency and asked her to perform a similar errand. Koseniensky did so at the same bank Langston had visited. Two days later, Mr. Ratzlaf gave George Chanouzas $7,500 in cash and asked him to buy a single cashiers check. Chanouzas also performed this transaction at the First Interstate Bank in Portland. Between November 29 and December 5, 1988, the Ratzlafs separately and together used currency to purchase five cashiers

checks, each in amounts less than $10,000, from two other Portland banks.

When asked by IRS investigators why they had paid for the cashiers checks with cash, the Ratzlafs asserted that the money was gambling proceeds and that the High Sierra casino asked them to "pay off the marker" with cashiers checks. Mrs. Ratzlaf also stated that the casino management instructed them to purchase cashiers checks in small amounts so that the casino would not be required to complete a CTR. Mr. Ratzlaf testif·ed at trial that the couple kept gambling winnings and cash revenues from their restaurant hidden in a piece of furniture in their bedroom. Allmaras denied suggesting to the Ratzlafs that they visit various banks and purchase

cashiers checks in amounts less than $10,000.

On November 20, 1990 a federal grand jury indicted the Ratzlafs and Hunt. The trio was charged with (1) conspiracy to structure and assist in structuring financial transactions for the purpose of evading reporting requirements; (2) four counts of structuring currency transactions to evade reporting requirements; and (3) interstate travel in aid of racketeering. At trial, the district judge instructed the jury as follows on the structuring charges:

> The essential elements required to be proven beyond a reasonable doubt...are as follows:
>
> First: The defendants had knowledge of a financial

institution's duty to report currency transactions in excess of $10,000;

Second: With such knowledge, the defendants knowingly and willfully structured or assisted in structuring or attempted to structure or assist in structuring a currency transaction;

Third: The purpose of the structured transaction was to evade the transaction reporting requirement;

Fourth: The structured transaction(s) involved one or more domestic financial institutions.

....

An act is done knowingly and willfully for the purpose of [31 U.S.C. §§ 5322(a), 52324(3)] if the

defendants, with knowledge of a financial institution's duty to report currency transactions in excess or $10,000, voluntarily or intentionally structured or assisted in structuring or attempted to structure or assist in structuring a currency transaction with the purpose of evading the currency reporting requirements.

The government does not have to prove that the defendants knew that structuring was unlawful[,] nor does the government have to prove that the defendants knew of the existence of the law which they are charged with breaking.... However, if a defendant did not have knowledge of a bank's duty to report currency transactions in

excess or $10,000, that may be considered a defense.

It is not a defense that the defendants did not know that "structuring" itself is [illegal] or of the existence of [31 U.S.C. §§5322(a), 5324(3)].

The jury convicted Mr. Ratzlaf on all counts and Mrs. Ratzlaf on the conspiracy and interstate travel charges.[1] Mr. Ratzlaf was sentenced to fifteen months in federal prison on each count, to run concurrently; three years supervised release; and to pay a fine of $26,300 and a special assessment of $300. Mrs. Ratzlaf was sentenced to five years probation on each count, to

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[1]Hunt was convicted on the conspiracy count, two structuring counts, and the interstate travel charge. His convictions are not at issue in this appeal.

run concurrently and to include ten months home detention, and to pay a $7,900 fine and a $100 special assessment. The defendants filed timely notices of appeal on July 10 and August 14, 1991.

II

We review de novo the question whether the jury instructions in this case misstated the elements of the crime of structuring financial transactions to avoid the currency reporting requirements. United States v. Durham, 941 F.2d 886, 890 (9th Cir. 1991). "We review a claim of error in a jury instruction by looking to 'the adequacy of the entire charge...in the context of the whole trial.'" United States v. Mundi, 892 F.2d 817, 818 (9th Cir. 1989), cert. denied, 111 S.Ct. 1072

(1991) (quoting United States v. Marabelles, 724 F.2d 1374, 1382 (9th Cir. 1984)).

III

31 U.S.C. § 5324 provides:

> No person shall for the purpose of evading the reporting requirements of section 5313(a) with respect to such transaction -
>
> ...
>
> (3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions.

Individuals that engage in such "structuring" activities are subject to criminal penalties, 31 U.S.C. § 5322(a) ("A person willfully violating this

subchapter or a regulation prescribed [there]under...shall be fined...or imprison[ed]...or both.") (emphasis added).[2]

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[2]The Bank Secrecy Act of 1970, 31 U.S.C. § 5313(a), and associated regulations promulgated under its authority, 31 C.F.R. § 103.22(a)(1), obligate financial institutions to report to the government currency transactions involving more than $10,000. Congress enacted this law because individuals involved in criminal activity frequently engage in sizeable cash transactions. The reports, called "Currency Transaction Reports" or "CTRs," help law enforcement officers investigate and fight a variety of criminal activity. See generally H.R. Rep. No. 975, 91st Cong. 2d Sess., reprinted in 1970 U.S.C.C.A.N. 4394, 4396; Rusch, Hue and Cry in the Counting-House: Some Observations on the Bank Secrecy Act, 37 Cath. U.L. Rev. 465, 469-73 (1988).

The Bank Secrecy Act did not apply to bank customers prior to January 1987. Before that time individuals who "structured" transactions to avoid the $10,000 reporting threshold could be prosecuted only for willfully causing a financial institution to fail to file a CTR, 18 U.S.C. § 2(b), for knowingly and willfully concealing a material fact

[1] We recently rejected an argument that an individual cannot be convicted of "structuring" unless the government proves that he or she knew such activities are illegal:

> Congress had set the reporting requirement for the banks. Congress was aware that several circuits, including ours, had held it no crime to structure deposits so that the reporting requirement would not be triggered. Congress changed the law to make it a crime so to structure with the intent to prevent reporting. To act willfully under the statute is to act with this intent....

United States v. Hoyland, 914 F.2d 1125, 1129-30 (9th Cir. 1990) (internal statutory citations omitted). In so holding, we agreed with United States v. Scanio, 900 F.2d 485 (2nd Cir. 1990). There, the Second Circuit concluded that knowledge of illegality is not required to convict for "structuring" because such conduct is "affirmative" and "demonstrate[s] an awareness of the legal framework relative to currency transactions which, it is reasonable to conclude, should...alert[] [the defendant] to the consequences of his conduct." Id. at 490 (citing United States v. Int'l Minerals & Chem. Corp., 402 U.S. 558, 564-65 (1971), and United

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from the government, 18 U.S.C. § 1001, or for conspiracy, 18 U.S.C. § 371, United States v. Scanio, 900 F.2d 485 (2d Cir. 1990). As part of the Anti-Drug Abuse Act of 1986, Congress enacted 31 U.S.C. § 5324.

States v. Fierros, 692 F.2d 1291, 1295 (9th Cir.), cert. denied, 462 U.S. 1120 (1983)). The court explained that, unlike other sections of the Bank Secrecy Act,[3] the purpose of section 5324(3) is to protect the government's right to information. To require proof that the defendant knew structuring to be illegal would be inconsistent with this goal. 900 F.2d at 491. See also United States v. 316 Units of Municipal Securities, 725 F.Supp. 172, 177-79 (S.D.N.Y. 1989) (civil forfeiture action).

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[3]Specifically, the court addressed the distinction between "willful" as used in section 5324(3) and as employed in 31 U.S.C. § 5316, which proscribes an individual's failure to file "Currency and Monetary Instrument Reports." The Scanio court explained that section 5316 "requires individuals to report otherwise innocent transactions...." 900 F.2d at 491.

[2] The Ratzlafs argue that the Supreme Court's recent decision in Cheek v. United States, 111 S.Ct. 604 (1991), overrules Hoyland and Scanio. Cheek was a criminal tax case. The defendant had been charged with willfully attempting to evade income taxes and with willfully failing to file tax returns, violations of 26 U.S.C. §§ 7201 and 7203. The Court held that willfully means the "'voluntary, intentional violation of a known legal duty.'" 111 S.Ct. at 610 (citation omitted) (applying and discussing United States v. Murdock, 290 U.S. 389, 396 (1933); United States v. Bishop, 429 U.S. 10, 12 (1976) (per curiam)).

The Court explained its holding with reference to the tax laws:

Willfulness, as construed by our prior decisions in criminal tax cases, requires the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty....[If] the issue is whether the defendant knew of the duty purportedly imposed by the... statute...he is accused of violating, . . . the Government [satisfies the knowledge component of the willfulness requirement if it] proves actual knowledge of the pertinent legal duty . . . .But Carrying this burden requires negating a defendant's claim of ignorance of the law....This is so

because one cannot be aware that the law imposes a duty upon him and yet be ignorant of it,...or believe that the duty does not exist.

Id. at 610-11 (emphasis added).

The Court explained that Congress employed the term "willfully" in the criminal tax laws because their "proliferation ... has sometimes made it difficult for the average citizen to know and comprehend the extend of [their] duties and obligations" under the tax laws. Id. at 609 (emphasis added). The Court noted that it had long construed "willfully" in the criminal tax statutes "as carving out an exception to the traditional rule" that "every person kn[ows] the law." Id. The Court does this, according to the

Cheek majority, because the tax laws are "complex[]." Id.

[3] Four federal courts have answered the question whether Cheek requires the government to prove a structuring defendant knew that such activity is illegal. In United States v. Dashney, 937 F.2d 532 (10th Cir.), cert. denied, 112 S.Ct. 402 (1991), the court rejected the notion that Cheek changes the Hoyland and Scanio conclusions:

> Criminal tax statutes are more analogous to...international currency reporting statutes . . ., since entirely innocent actions can lead to violations of the law. [But] Dashney's actions were anything but innocent, as he went to great lengths to avoid the

> filling out of CTRs in connection with his transactions.

Id. at 540 (internal citations omitted). See also United States v. Nall, 949 F.2d 301, 307 (10th Cir. 1991). In United States v. Rogers, 962 F.2d 342 (4th Cir. 1992), the court agreed with Dashney, holding that the Cheek exception is a narrow one. The court emphasized that Cheek's rationale is inapplicable to the structuring statute because it is not complex. Id. at 344. See also United States v. Wollman, 945 F.2d 79, 81 (4th Cir. 1991) (per curiam) (summarily affirming structuring conviction without addressing Cheek). Similarly, in United States v. Brown, 954 F.2d 1563, (11th Cir. 1992), the court refused to apply the Cheek exception to section 5324(3). "[Congress"] intent to facilitate

prosecution of money launderers, stands in direct contrast to the ... holding in Cheek that Congress intended to show special deference to Tax Code violators, [because] the tax laws [are complex]." Id. at 1569 n.2. Cf. United States v. Donovan, 1992 WL 18217, at *4, 1992 U.S. App. LEXIS 1535, *7-*9 (1st Cir. Feb. 6 1992) (rejecting argument that Cheek requires proof of knowledge that failure to report currency transactions exceeding $10,000 is illegal and declaring that "the Cheek exception is restricted to tax crimes").

The result was different in United States v. Aversa, 762 F.Supp. 441 (D.N.H. 1991). There, the defendants were convicted of structuring after one of the men, Aversa, asked his investment partner and co-defendant Mento to help

him conceal proceeds of a legal real estate transaction from his wife, with whom Aversa was engaged in a contentious divorce battle. Aversa asked Mento to allow him to deposit his portion of the real estate revenues in Mento's account and agreed to sign a letter to the IRS stating that the money deposited in Mento's account belonged to Aversa and that Aversa deposited less than $10,000 at a time to avoid arousing IRS suspicion of his income sources and level. The letter was provided to the IRS, and Aversa subsequently engaged in transactions involving less than $10,000 on several occasions.

The New Hampshire district court ruled that Aversa could not be convicted of structuring because he did not know that structuring is illegal. The court

reached this conclusion for three reasons. First, structuring can be "innocent" behavior in the sense that no concealment of illegal activity is intended or effected. 762 F.Supp. at 446. Second, the court rejected the Scanio/Hoyland definition of "willful" because it means that there would be no difference between the proscribed "willful" violations of section 5324 and non-willful violations of section 5324. Id. at 447-48. Finally, the court believed that Cheek's reasoning applied because "[w]hile § 5322(a) may not be technically a criminal tax law it is certainly a criminal law related to taxation." Id. at 447 (emphasis in original). In addition, the court was convinced that the structuring laws are just as complex as "obscure" to the

average citizen as are the tax laws. 762 F.Supp. at 447.

[4] We disagree with the Aversa court for several reasons. First, the currency structuring and reporting statutes are not "complex" in the sense that the Cheek Court used that term in referring to the Internal Revenue Code. The tax laws are "[o]ne of the most esoteric areas of the law...[,] replete with 'full-grown intricacies', [where] it is rare that a 'simple, direct statement of the law can be made without caveat.'" United States v. Regan, 937 F.2d 823, 827 (2d Cir.) (citation omitted), modified, 946, F.2d 188 (1991). The tax code's lengthy and complicated list of income sources that are and are not taxable and the conditions under which exemptions and

deductions apply are in stark contrast to the two things outlawed by the money laundering statutes: failure of a financial institution to report transactions that exceed $10,000; and attempts, successful or unsuccessful, to prevent financial institutions from making the required reports by intentionally avoiding the $10,000 threshold in banking transactions.

[5] Second, we do not think the rule of lenity applies to the money laundering statutes. Mens rea is generally required to convict a person for a crime, and where a statute does not clearly specify the mental state required for conviction, courts construe the ambiguity in favor of the defendant. See United States v. United States Gypsum Co., 438 U.S. 422, 437 (1978);

Rewis v. United States, 401 U.S. 808, 812 (1971). But the language and history of the structuring statute is not ambiguous, and even a "strict" reading of the statute supports, not undercuts, the government's proffered interpretation.[4] Compare Liparota v. United States, 471 U.S. 419, 424-25 & n.7 (1985) (noting ambiguity in statute where unclear whether "knowingly" applied to all elements of the offense).

[6] Hoyland and Scanio rest firmly upon Congress' intent in proscribing structuring. Before the enactment of section 5324(3), several courts,

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[4] Morissette v. United States, 342 U.S. 246, 261-63 (1952), casts no doubt on this proposition. There, the Court held that, as a general rule, mens rea must be assumed a requirement to convict under a statute that codifies a common law crime. Structuring, however, was not a criminal offense at common law. Hoyland, 914 F.2d at 1129.

including this one, rejected attempts to impose any criminal liability for structuring financial transactions to avoid reporting requirements.[5] In 1986, Congress decided to close this apparent loophole in the government's information gathering scheme. See Scanio, 900 F.2d at 488 (citing S. Rep. No. 433, 99th Cong., 2d Sess. 22 (1986); H.R. Rep. No. 746, 99th Cong., 2d Sess. 18-20 (1986)); Hoyland , 914 F.2d at 1129; Dashney, 937 F.2d at 537-38. When Congress effected this amendment to the money laundering and currency reporting statutes, it did not change the language of section 5322(a). In adding section

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[5]See, e.g., United States v. Varbel, 780 F.2d 758, 762 (9th Cir. 1986); United States v. Anzalone, 766 F.2d 676, 679-83 (1st Cir. 1985). But see, e.g., United States v. Taboon-Builes, 706 F.2d 1092, 1096-1101 (11thCir. 1983).

5324(3), Congress likewise did not specify that a greater "state of mind" would be required to secure a conviction under it than that established by section 5322. Thus, after the 1986 amendments, one could be prosecuted for violating section 5324(3) if he or she "willfully" structured transactions.[6]

The legislative history of the Anti-Drug Abuse Act clearly indicates that this interpretation of Congressional intent is correct:

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[6]Congress' decision to add section 5324(3) to the United States Code also did not modify the traditional meaning of "willfulness," viz., the defendant intended to do the act with which he is charged. See Scanio, 900 F.2d at 489 ("A requirement that the conduct be willful generally means no more than that the person charged with the duty knows what he is doing. It does not mean that, in addition, he must suppose he is breaking the law.") (quoting American Surety Co. v. Sullivan, 7 F.2d 605, 606 (2d Cir. 1925) (L.Hand, J.)).

> [A] person who converts $18,000 in currency to cashiers checks by purchasing two $9,000 cashier's checks at two different banks or on two different days with the specific intent that the participating bank or bans not be required to file [CTRs] for those transactions, would be subject to potential civil and criminal liability. A person conducting the same transactions for any other reasons...would not be subject to liability under the proposed amendment.

S. Rep. No. 433, 99th Cong., 2d Sess. 22 (1986) (quoted in Dashney, 937 F.2d at 538).[7]

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[7]There is little indication that this interpretation of section 5324(3)'s history and purpose is incorrect. One

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report on the Anti-Drug Abuse Act included a proposal to change "willfully" in section 5322 to "knowingly." H.R. Rep. No. 855, 99th Cong., 2d Sess. 7, 27 (1986) (Report of House Judiciary Committee). The report noted that the term "willfully" has been ascribed different meanings in different statutory contexts and explained that its meaning in the money laundering statute was an "actual awareness of the reporting requirement...." Id. at 21-22. The Judiciary Committee Report recommended a change to the word "knowingly," explaining that this change would not be intended to change the meaning of the statute. Id. The House Committee on Banking, Finance and Urban Affairs issued a report similar to that of the Judiciary Committee. H.R. Rep. No. 746, 99th Cong., 2d Sess. 29 (1986). It stated that "[i]n the criminal context the term "knowingly" means with specific intent to commit a violation of the...Act" or "specific intent to commit a crime." Id. at 41. The report also suggested a change to the term "knowingly."

We agree with the Tenth Circuit that these committee reports are not helpful. First, the legislation discussed in the Judiciary Committee Report did not contain any prohibition of structuring. Dashney, 937 F.2d at 537 n.5. That means the Committee was not contemplating the appropriate state of mind when it was considering

[7] The Aversa court's premise - that a defendant must know of the reporting requirements to be convicted of structuring - is therefore correct, but does not support the holding of that case. I a defendant knows that the bank must report a currency transaction and then intentionally acts in a way to prevent that, he has acted "willfully." One does not act "willfully" under section 5322 unless both parts of this equation are present. See Dashney, 937 F.2d at 539. There is no danger that someone who does not know of the reporting requirements could be

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structuring. Second, the reports were submitted with bills rejected by Congress. Thus, although Congress did ultimately make changes in the money laundering laws, "it is [not] reasonable to assume that [Congress] adopted the intent of the[se] committee[s]," Sutherland's Statutory Construction § 48.06, at 332 (5th ed).

convicted under that mens rea standard; nor is there any way that one who knows of the reporting requirements but who does not intend to prevent such reporting can be convicted of structuring. No one can be convicted of "violating" section 5324(3) unless he or she knows of the reporting requirements and that he or she is doing something to prevent such reporting.

Finally, this case presents little risk that persons who engaged in "innocent" actions stand unjustly convicted of structuring. The Ratzlafs were aware of the reporting requirements, and the evidence indicates that the Ratzlafs apparently were seeking to avoid payment of their income taxes. The couple took no steps to insure that the IRS would be aware of

the assets used to purchase the cashiers checks; denied that they earned money from gambling when in fact they had done so; denied any failure to report gambling income; and apparently hid large amounts of currency in or near their home. The Ratzlafs cannot be compared to an individual involved in perfectly ordinary business transactions who unconsciously breaks the currency laws. Compare Aversa, 762 F.Supp. at 446.

IV

Cheek did not overrule Hoyland. We join the Fourth, Tenth, and Eleventh Circuits in reaching this holding. Accordingly, the instructions given by the district court were not improper. The defendants' convictions are therefore AFFIRMED.

No. 92-1196

In the Supreme Court of the United States

OCTOBER TERM, 1992

WALDEMAR RATZLAF AND
LORETTA RATZLAF, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether, in a prosecution for structuring currency transactions for the purpose of evading currency reporting requirements, the government must prove that the defendant knew that structuring transactions for that purpose was unlawful.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1196

WALDEMAR RATZLAF AND
LORETTA RATZLAF, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-40) is reported at 976 F.2d 1280.

JURISDICTION

The judgment of the court of appeals was entered on October 6, 1992. On January 4, 1993, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including January 19, 1993. The petition for a writ of certiorari was filed on January 14, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Nevada, petitioner Waldemar Ratzlaf was convicted on four counts of willfully structuring currency transactions for the purpose of evading federal reporting requirements, in violation of 31 U.S.C. 5322(a) and 5324(3).[1] Both petitioners were convicted of conspiring to violate the federal anti-structuring laws, in violation of 18 U.S.C. 371, and of interstate travel in aid of racketeering, in violation of 18 U.S.C. 1952(a)(3). Waldemar Ratzlaf was sentenced to 15 months in prison, to be followed by three years of supervised release, and was fined $26,300. Loretta Ratzlaf was sentenced to five years of probation, including ten months of home detention, and was fined $7,900. Pet. App. 13, 16-17. The court of appeals affirmed. Pet. App. 1-40.

1. Petitioners were gamblers with established lines of credit at 15 casinos in New Jersey and Nevada. Petitioner Waldemar Ratzlaf was a regular customer in the casinos. He was a high-stakes gambler. On October 20, 1988, the High Sierra Casino increased Waldemar's line of credit from $25,000 to $160,000. That day, he used up his credit limit by losing $160,000 at blackjack. The casino gave Waldemar one week to pay the debt. Pet. App. 8-9.

On October 27, petitioners returned with cash to pay their debt. Waldemar Ratzlaf told the shift manager that he did not want any written report to be filled out

[1] We note that on October 28, 1992, Congress amended 31 U.S.C. 5324. See Annunzio-Wylie Anti-Money Laundering Act, Pub. L. No. 102-550, Tit. XV, § 1525(a), 106 Stat. 4064. What was formerly 31 U.S.C. 5324(3) was unaffected in substance, but that provision will be recodified at 31 U.S.C. 5324(a)(3). For purposes of simplicity, we refer to the version in effect when the court of appeals issued its decision.

concerning the transaction. When the shift manager told the casino's vice president Stephen Allmaras about the situation, Allmaras told Ratzlaf that the casino would be required to fill out a report on the transaction because it involved more than $10,000 in currency. Allmaras told petitioner that he would accept a single cashier's check in lieu of the cash. Pet App. 9-10.

The next day, petitioners went to several banks in and around Stateline, Nevada, and South Lake Tahoe, California. They used cash to purchase, or attempt to purchase, cashier's checks in amounts of less than $10,000. After doing so, petitioners went back to the High Sierra Casino and made a partial payment on their debt. Pet. App. 10-11.

Petitioners returned to their residence in Portland, Oregon. Between November 28 and November 30, 1988, Waldemar gave three individuals cash and asked them to purchase cashier's checks for him, two for $5,000 and one for $7,500. Between November 29 and December 5, 1988, petitioners used currency to buy five cashier's checks in amounts less than $10,000 from two banks. Pet. App. 11-12.

Internal Revenue Service investigators asked petitioners why they had bought the cashier's checks with cash. Petitioners claimed that they had enough currency from gambling proceeds,[2] but that the casino had asked them to use cashier's checks to pay their $160,000 debt. Petitioner Loretta Ratzlaf added that the management told them to buy cashier's checks in small amounts so that the casino would not have to file a report. The casino vice president denied that he advised

[2] At trial, Waldemar Ratzlaf testified petitioners hid earnings from a restaurant they owned and gambling winnings in furniture in their bedroom. Pet. App. 12.

petitioners to purchase cashier's checks at several banks in amounts less than $10,000. Pet. App. 12-13.

2. At trial, the district judge gave the jury the following instruction on the currency structuring charges:

> The essential elements required to be proven beyond a reasonable doubt . . . are as follows:
>
> First: [Petitioners] had knowledge of a financial institution's duty to report currency transactions in excess of $10,000;
>
> Second: With such knowledge, [petitioners] knowingly and willfully structured or assisted in structuring or attempted to structure or assist in structuring a currency transaction;
>
> Third: The purpose of the structured transaction was to evade the transaction reporting requirement;
>
> Fourth: The structured transaction(s) involved one or more domestic financial institutions.
>
> An act is done knowingly and willfully for the purpose of [31 U.S.C. 5322(a), 5324(3)] if [petitioners], with knowledge of a financial institution's duty to report currency transactions in excess of $10,000, voluntarily or intentionally structured or assisted in structuring or attempted to structure or assist in structuring a currency transaction with the purpose of evading the currency reporting requirements.
>
> . . . .
>
> The government does not have to prove that the [petitioners] knew that structuring was unlawful[,] nor does the government have to prove that the defendants knew of the existence of the law which they are charged with breaking. . . . However, if a defendant did not have knowledge of a bank's duty to report currency transactions in excess [of] $10,000, that may be considered a defense.
>
> It is not a defense that the [petitioners] did not know that "structuring" itself is [illegal] or of the existence of [31 U.S.C. 5322(a), 5324(3)].

Pet. App. 13-16.

3. In affirming petitioners' convictions, the court of appeals held that a willful violation of the currency structuring statute (31 U.S.C. 5324(3)) requires proof that the defendant structured currency transactions with the intent to evade reporting requirements imposed by law, but that knowledge that structuring is illegal is not necessary for conviction. Pet. App. 21-22. The court rejected petitioners' contention that, as in the case of criminal tax offenses (see *Cheek* v. *United States*, 498 U.S. 192 (1991)), the government must establish knowledge of illegality in order to establish criminal willfulness under the anti-structuring laws. The court noted that this Court in *Cheek* relied heavily on the complexity of the tax laws, and emphasized that its interpretation of "willfully" in the criminal tax statutes was " 'an exception to the traditional rule' that 'every person kn[ows] the law.' " Pet. App. 25 (quoting *Cheek*, 498 U.S. at 199, 200). Finding that the anti-structuring laws do not present similar concerns, the court joined several other courts of appeals in finding the rationale of *Cheek* inapplicable to willful violations of Section 5324(3). Pet. App. 26-28.

The court further concluded that nothing in the language or history of Section 5324(3) suggests that it requires knowledge that structuring is illegal. In particular, the court noted that Section 5324(3) was enacted in 1986 because several courts of appeals had held that it was not unlawful to structure currency transactions to

avoid federal reporting requirements. The court explained that Section 5324(3) was designed to overturn those decisions and codify the rulings of other courts that structuring of currency transactions constituted a criminal offense. Pet. App. 33-38.

DISCUSSION

Petitioners contend that to prove a "willful[] violat[ion]" (31 U.S.C. 5322(a)) of the anti-structuring provisions of 31 U.S.C. 5324(3), the government must establish that the defendant knew it was unlawful to structure currency transactions for the purpose of evading federal reporting requirements. Pet. 16-31. We believe that the court of appeals properly rejected petitioners' claim. However, because there is a conflict among the circuits on this important issue of federal law, we do not oppose the petition for a writ of certiorari.

1. a. In 1970, Congress passed the Currency and Foreign Transactions Reporting Act (Bank Secrecy Act), Pub. L. No. 91-508, Tit. II, 84 Stat. 1118, in response to an increase in the use of financial institutions by those engaged in criminal activity. See H.R. Rep. No. 975, 91st Cong., 2d Sess. 10 (1970) (legislation is needed because "[p]etty criminals, members of the underworld, those engaging in 'white collar' crime and income tax evaders use, in one way or another, financial institutions in carrying on their affairs"). To combat that trend, Congress enacted the provision now codified at 31 U.S.C. 5313(a), which requires a "domestic financial institution" to file a report when it engages in "a transaction for the payment, receipt, or transfer" of cash or other designated monetary instruments in an amount or denomination prescribed by the Secretary of the Treasury.[3] See Pub.

[3] By regulation, the Secretary has required banks to file currency transaction reports (CTRs) for any "transaction in currency of more than $10,000." 31 C.F.R. 103.22(a)(1).

L. No. 91-508, Tit. II, § 221, 84 Stat. 1122. Congress also provided that any person who "willfully violat[es]" the provisions of Title 31 that include the reporting requirements, or any regulation prescribed thereunder, is guilty of a criminal offense. 31 U.S.C. 5322(a). See Pub. L. No. 91-508, Tit. II, § 209, 84 Stat. 1121.

Until 1986, no provision specifically prohibited individuals doing business with financial institutions from structuring their transactions to evade the statute's reporting requirements.[4] In the Money Laundering Control Act of 1986, which was enacted as Title I, Subtitle H of the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207-18, Congress adopted the anti-structuring provision at issue here. See Pub. L. No. 99-570, § 1354(a), 100 Stat. 3207-22. Specifically, 31 U.S.C. 5324(3) provides that "[n]o person shall for the purpose of evading the reporting requirements of section 5313(a) * * * structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions."

b. The court of appeals' holding—that a willful violation of Section 5324(3) does not require proof that the defendant knew that structuring is unlawful—is consistent with the decisions of nine other courts of appeals. See, *e.g.*, *United States* v. *Scanio*, 900 F.2d 485, 489-492

[4] Prior to 1986, there was a conflict in authority over the question whether a person who structured currency transactions to evade reporting requirements could be criminally liable under various theories of accessory liability. Compare, *e.g.*, *United States* v. *Tobon-Builes*, 706 F.2d 1092, 1096-1101 (11th Cir. 1983) (criminal liability under 18 U.S.C. 2(b) and 1001), and *United States* v. *Heyman*, 794 F.2d 788, 790-793 (2d Cir.) (liability under 18 U.S.C. 2(b) and 371), cert. denied, 479 U.S. 989 (1986), with *United States* v. *Anzalone*, 766 F.2d 676, 679-683 (1st Cir. 1985) (no liability), and *United States* v. *Varbel*, 780 F.2d 758, 760-763 (9th Cir. 1986) (same).

(2d Cir. 1990); *United States* v. *Caming*, 968 F.2d 232, 238-241 (2d Cir.), cert. denied, 113 S. Ct. 416 (1992); *United States* v. *Shirk*, 981 F.2d 1382, 1389-1392 (3d Cir. 1992); *United States* v. *Rogers*, 962 F.2d 342, 343-345 (4th Cir. 1992); *United States* v. *Beaumont*, 972 F.2d 91, 93-95 (5th Cir. 1992) (no plain error); *United States* v. *Baydoun*, No. 92-5594 (6th Cir. Jan. 25, 1993), slip op. 9; *United States* v. *Jackson*, No. 90-1836 (7th Cir. Jan. 4, 1993), slip op. 17-18; *United States* v. *Gibbons*, 968 F.2d 639, 643-645 (8th Cir. 1992); *United States* v. *Hoyland*, 914 F.2d 1125, 1128-1130 (9th Cir. 1990); *United States* v. *Dashney*, 937 F.2d 532, 537-540 (10th Cir.), cert. denied, 112 S. Ct. 402 (1991); *United States* v. *Brown*, 954 F.2d 1563, 1567-1569 (11th Cir.), cert. denied, 113 S. Ct. 284 (1992); but see *United States* v. *Aversa*, No. 91-1363 (1st Cir. Jan. 13, 1993) (en banc), slip op. 16-17, 21. Under those decisions, the element of willfulness is "satisfied by proof that [the defendant] (1) knew that the bank was legally obligated to report currency transactions exceeding $10,000 and (2) intended to deprive the government of information to which it is entitled." *Scanio*, 900 F.2d at 491.

We believe that those decisions correctly interpret the anti-structuring laws. A "willful violation" is often described as a criminal act done with a "bad purpose" or "evil motive." *United States* v. *Murdock*, 290 U.S. 389, 394, 395 (1933). As the language of Section 5313(a) makes plain, and the legislative history of the Bank Secrecy Act confirms (see H.R. Rep. No. 975, *supra*, at 10), the purpose of the "currency transaction report" (CTR) requirement is to provide the government with information about the individuals engaging in large currency transactions. To effectuate that aim, Section 5324 specifically proscribes the structuring of cash transactions "for the purpose of evading the reporting requirements of section

5313(a)."[5] Thus, in plain terms, Section 5324 specifies the "bad purpose" (*Murdock*, 290 U.S. at 394) with which a defendant must act to commit a "willful[]" anti-structuring violation. If a person knows about a bank's duty to provide information about large currency transactions conducted with its customers, and then acts with the specific intent to deprive the government of that information about himself, he is acting with the precise "bad purpose" contemplated by Section 5324.

Interpreting the willfulness element to require knowledge of, and a specific intent to evade, the CTR requirements, rather than knowledge that structuring is unlawful, is the construction of the anti-structuring statute most consistent with basic principles of criminal law. That construction of the statute gives effect to the general rule that "ignorance of the law is no excuse"—a premise "deeply rooted in the American legal system." *Rogers*, 962 F.2d at 344; see, *e.g.*, *Cheek*, 498 U.S. at 199; *Lambert* v. *California*, 355 U.S. 225, 228 (1957); *United States* v. *International Minerals & Chemical Corp.*, 402 U.S. 558, 565 (1971). It is true that Congress has at times departed from that rule (1) where its application could penalize "a broad range of apparently innocent con-

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[5] As one court of appeals has explained, in enacting Section 5324, Congress's

> target was the transactors—the 'money launderers,' a term we use broadly to denote persons desiring to convert 'hot,' suspiciously large, or easily traced cash sums into more discreet media of exchange—themselves. The statute's aim was to prevent people from either causing the (usually innocent) bank to fail to file a required report or defeating the goal of the requirement that large cash deposits be reported to the [IRS] by breaking their cash hoard into enough separate deposits to avoid activating the requirement.

United States v. *Davenport*, 929 F.2d 1169, 1173 (7th Cir. 1991) (Posner, J.), cert. denied, 112 S. Ct. 871 (1992).

duct," *Liparota* v. *United States*, 471 U.S. 419, 426 (1985) (misuse of food stamps), or (2) in the criminal tax context, where the complexity and proliferation of statutes and regulations has made "it difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed." *Cheek*, 498 U.S. at 199-200. But neither of those exceptions applies in the context of the anti-structuring laws.

First, even if a defendant does not specifically know that purposeful structuring is unlawful, his conduct by its nature displays a "careless disregard whether or not [he] ha[d] the right so to act." *Murdock*, 290 U.S. at 395. When an individual purposefully structures a cash transaction to evade CTR requirements of which he is aware, he "engage[s] in affirmative conduct and demonstrate[s] an awareness of the legal framework relative to currency transactions which, it is reasonable to conclude, should have alerted him to the consequences of his conduct." *Scanio*, 900 F.2d at 490. In other words, a person who has evaded a known CTR requirement "knew he was acting in a highly regulated area and * * * intended to deprive the government of information to which it was entitled." *Ibid.* (emphasis omitted). Those are not circumstances of the kind that have typically led Congress to require specific knowledge of the unlawfulness of a defendant's acts. See *International Minerals & Chemical Corp.*, 402 U.S. at 565 (knowledge of regulatory prohibition not necessary where "the probability of regulation is so great" that someone acting in the manner prohibited "must be presumed to be aware of the regulation").

Second, the principle that the Court has applied in the criminal tax context is inapposite here. As the Court emphasized in *Cheek*, the "special treatment of criminal tax offenses is largely due to the complexity of the tax laws" and the extensive "proliferation of [tax] statutes

and regulations." 498 U.S. at 199, 200. In contrast, "[t]he currency reporting and structuring laws are not as complex as the often Byzantine tax code" (*Shirk*, 981 F.2d at 1391), and the courts of appeals have properly refused to extend the criminal tax standard of "willfulness" to the present context. See, *e.g.*, *United States* v. *Caming*, 968 F.2d at 240-241; *United States* v. *Rogers*, 962 F.2d at 344; *United States* v. *Beaumont*, 972 F.2d at 94-95; *United States* v. *Brown*, 954 F.2d at 1569 n.2; *United States* v. *Dashney*, 937 F.2d at 539-540.

The court of appeals' decision in this case is consistent with the Model Penal Code's conclusion that "[a] requirement that an offense be committed wilfully is satisfied if a person acts knowingly with respect to the material elements of the offense, unless a purpose to impose further requirements appears." Model Penal Code and Commentaries § 2.02(8), at 227 (Official Draft and Revised Comments 1985).[6] As the commentary to the Code noted, that distillation of the "wilfulness" requirement "follows many judicial decisions as well as legislation in a number of states." *Id.* § 2.02 comment 10, at 248 & nn.44-45; see *American Surety Co.* v. *Sullivan*, 7 F.2d 605, 606 (2d Cir. 1925) (L. Hand, J.) ("The word 'willful,' even in criminal statutes, means no more than that the person charged with the duty knows what he is doing. It does not mean that, in addition, he must suppose that he is breaking the law.") (citing cases). In the absence of any indication that a more substantial

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[6] Just prior to the enactment of the Bank Secrecy Act of 1970, the Supreme Court in *Leary* v. *United States*, 395 U.S. 6, 46 & n.93 (1969), and *Turner* v. *United States*, 396 U.S. 398, 416 & n.29 (1970), relied on the Model Penal Code's definition of the term "knowledge" in construing a federal criminal statute that used the term "knowing"; hence, it is reasonable to look to the Code's definition of "willfulness" for guidance in determining what that related term means.

"willfulness" requirement was intended, the courts have properly construed that requirement as being met when a defendant structures currency transactions with the specific intent to evade known CTR requirements.

Finally, the legislative history preceding the enactment of Money Laundering Control Act of 1986 confirms that a knowing evasion of the CTR requirement is all that is necessary to prove a willful violation of Section 5324(3). As discussed, no statutory provision prior to 1986 explicitly forbade the structuring of transactions to evade the CTR requirement, and there was a conflict among the circuits on the question whether a person who structured transactions to avoid reporting requirements was criminally liable. See note 4, *supra*. The leading case holding structuring unlawful was *United States* v. *Tobon-Builes*, 706 F.2d 1092 (11th Cir. 1983), which held that purposeful structuring constituted an offense under 18 U.S.C. 1001 and 2(b).[7] Significantly, the court in *Tobon-Builes* held that the "willfulness" requirement of Sections 1001 and 2(b) was established "by evidence showing [that the defendant] knew about the currency reporting requirements and that he purposely sought to prevent the financial institutions from filing required reports * * * by structuring his transactions

[7] In relevant part, Section 1001 imposes criminal penalties on any person who, "in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device, a material fact." Section 2(b) provides that one who "willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal." *Tobon-Builes* held that structuring was "nothing more than a scheme to prevent * * * financial institutions from fulfilling their legal duty to file reports," and that Section 2(b) was sufficiently broad to reach "one who 'causes the commission of an indispensable element of the offense by an innocent agent or instrumentality.'" 706 F.2d at 1098, 1099.

as multiple smaller transactions under $10,000." 706 F.2d at 1101.

The legislative reports preceding the 1986 enactment of Section 5324 relied directly on *Tobon-Builes*. The Senate Report accompanying a prior bill incorporating the substance of what became Section 5324 explained that the bill "would codify *Tobon-Builes* and like cases" and would "expressly subject to potential liability a person who causes or attempts to cause a financial institution to fail to file a required report." S. Rep. No. 433, 99th Cong., 2d Sess. 22 (1986); see *id.* at 38; H.R. Rep. No. 746, 99th Cong., 2d Sess. 18-19 & n.1 (1986) (favorably citing *Tobon-Builes*). That endorsement of *Tobon-Builes* confirms that Section 5324 was enacted to penalize persons who know of the reporting requirement and purposefully act to evade it. See *United States* v. *Brown*, 954 F.2d at 1569 ("It is highly unlikely that in passing the anti-structuring law, and thereby providing even more notice than the defendant had in *Tobon-Builes*, Congress was somehow imposing an additional requirement that the defendant be aware of the illegality of his or her conduct."); see also, *e.g.*, *United States* v. *Scanio*, 900 F.2d at 491; *United States* v. *Shirk*, 981 F.2d at 1391.

The Senate Report also offered the following explanation of the intent required under Section 5324:

> [A] person who converts $18,000 in currency to cashier's checks by purchasing two $9,000 cashier's checks at two different banks or on two different days *with the specific intent that the participating bank or banks not be required to file [CTRs] for those transactions*, would be subject to potential civil and criminal liability. A person conducting the same transactions for any other reasons or a person splitting up an amount of currency that would not be reportable if the full amount were involved in a single

> transaction * * * would not be subject to liability under the proposed amendment.

S. Rep. No. 433, *supra*, at 22 (emphasis added). The only state-of-mind requirement mentioned is the "specific intent" to prevent a bank from filing CTRs required by law; hence, there is no basis for engrafting the further requirement of knowledge of the statutory prohibition against structuring.

2. Although we believe that the court of appeals' decision was correct, we do not oppose the petition for a writ of certiorari in this case, because the courts of appeals are in conflict on the question presented. Subsequent to the decision in this case, the First Circuit, sitting en banc, issued a conflicting ruling in *United States* v. *Aversa*, No. 91-1363 (Jan. 13, 1993). There, the defendants acknowledged that they knew about the CTR requirements, and they purposefully structured currency transactions to avoid creating a paper trail that could be followed by the wife of one of the defendants. Both defendants sought to offer a defense premised on lack of knowledge of the unlawfulness of structuring, but the district court granted the government's motion in limine to exclude evidence relating to that defense. One of the defendants entered a conditional guilty plea, reserving the right to appeal the trial court's ruling on the government's motion. The other defendant was convicted after a jury trial in which the court instructed, over objection, that mistake-of-law is no defense. *Aversa*, slip op. 5-6.

The court of appeals consolidated the defendants' appeals with another appeal in a structuring case being reheard en banc.[8] In reversing their convictions, the en

[8] In that case, the conviction was affirmed because the district court had permitted the defendant to introduce evidence relating to his knowledge of the law and instructed the jury that the defendant had to act "with the specific intent to do something the law forbids, that is to say with bad purpose, either to disobey or disregard the law." *Aversa*, slip op. 5, 21-22.

banc court explicitly rejected the position of the majority of the circuits. See *Aversa*, slip op. 9. The court held instead that to prove a willful violation of the anti-structuring law, the government must show either the violation of a known legal duty (not to structure) or a reckless disregard of the law. *Id.* at 21. Applying that standard, the court reversed the convictions of both defendants, noting that neither of them had had the opportunity to "offer[] any evidence as to their ignorance of the antistructuring law." *Id.* at 22.

That decision conflicts with the rulings of every other court of appeals to consider the issue, including the court in this case. Moreover, because the decision in *Aversa* was rendered by the en banc court, the First Circuit is unlikely to reconsider its position.

Finally, the issue arises frequently, as it pertains to the construction of a basic element of the federal anti-structuring law, an important federal criminal statute. Review by this Court is therefore warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 1993

(3)

No. 92-1196

In The

Supreme Court of the United States

October Term, 1993

WALDEMAR RATZLAF AND LORETTA RATZLAF,

Petitioners,

vs.

UNITED STATES,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

JOINT APPENDIX

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff, v. WALDEMAR RATZLAF, LORETTA RATZLAF, and RON HUNT, Defendants.	) Criminal No. N-90-58-ECR INDICTMENT FOR VIOLATION OF: TITLE 18, UNITED STATES CODE, SECTION 371 – Conspiracy – (Count One) TITLE 31, UNITED STATES CODE, SECTIONS 5324(3) and 5322(a) – Structuring of Financial Transactions to Avoid Currency Reporting Requirements – (Counts Two, Three, Four, and Five)

TITLE 18, UNITED STATES CODE, SECTION 1952(a)(3) – Interstate Travel in Aid of Racketeering – (Count Six)

TITLE 18, UNITED STATES CODE, SECTION 2 – Aiding and Abetting

(Filed Nov. 20, 1990)

THE GRAND JURY CHARGES THAT:

COUNT ONE
(Conspiracy)

1. At all times relevant to this Indictment, Title 31, United States Code, Section 5313(a), and Title 31, Code of Federal Regulations, Section 103.22, required that a financial institution file a Currency Transaction Report (Internal Revenue Service Form 4789) with the Internal Revenue Service for each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution which involved a transaction in currency of more than $10,000.

2. On or about October 27, 1988, in the State and Federal District of Nevada and elsewhere,

WALDEMAR RATZLAF,
LORETTA RATZLAF,
and
RON HUNT,

defendants herein, and others known and unknown to the Grand Jury, did willfully and knowingly combine, conspire, confederate, and agree together and with each other and with others known and unknown to the Grand Jury, to:

a. Knowingly and willfully, for the purpose of evading the reporting requirements of Title 31, United States Code, Section 5313(a), and Title 31, Code of Federal Regulations, Section 103.22(a), structure and assist in the structuring of transactions with one or more domestic financial institutions, in violation of Title 31, United States Code, Sections 5324(3) and 5322(a); and

b. Defraud the United States by impeding, impairing, obstructing, and defeating the lawful governmental function of the Internal Revenue Service of collecting data and reports of currency transactions of more than $10,000 for the purpose of detecting and investigating violations of criminal laws.

THE GOAL OF THE CONSPIRACY

3. The goal of the conspiracy was to conceal the amount of WALDEMAR RATZLAF'S income and gambling activity from the Internal Revenue Service. WALDEMAR RATZLAF and LORETTA RATZLAF, with the assistance of RON HUNT, attempted to attain this goal by making payments to the High Sierra Casino in such a manner as to avoid the reporting requirements related to currency transactions in excess of $10,000.

MANNER AND MEANS BY WHICH THE CONSPIRACY WAS CARRIED OUT

4. Among the means by which the defendants would and did carry out the conspiracy were the following:

a. During the years 1986, 1987, and 1988, WALDEMAR RATZLAF gambled large sums of money at Caesar's Lake Tahoe and the High Sierra Casino, yet on their individual income tax returns for the years 1986 and 1987, WALDEMAR RATZLAF and LORETTA RATZLAF failed to report any amounts related to gambling.

b. In October 1988, WALDEMAR RATZLAF owed the High Sierra Casino $160,000. On October 27, 1988, WALDEMAR RATZLAF and LORETTA RATZLAF attempted to make a currency payment in excess of $10,000 on WALDEMAR RATZLAF'S $160,000 gambling debt.

c. On October 27, 1988, a High Sierra Casino employee informed WALDEMAR RATZLAF and LORETTA RATZLAF that, if they were [sic] make a currency payment to the casino in excess of $10,000, the casino would be required to report this currency transaction to governmental authorities.

d. On October 27, 1988, there was a discussion between WALDEMAR RATZLAF and LORETTA RATZLAF and a High Sierra Casino employee concerning how the RATZLAFS could make a payment on WALDEMAR RATZLAF'S gambling debt without the casino having to report the transaction to governmental authorities.

e. On October 27, 1988, WALDEMAR RATZLAF and LORETTA RATZLAF were informed by a High Sierra Casino employee that if WALDEMAR RATZLAF were to make a payment on his casino debt with a check then the casino would not have to report the transaction to governmental authorities.

f. On October 27, 1988, WALDEMAR RATZLAF and LORETTA RATZLAF were informed by RON HUNT to have the checks made payable to "Resorts Reservations".

g. On October 27, 1988, the High Sierra Casino limousine was made available to WALDEMAR RATZLAF and LORETTA RATZLAF so that RATZLAFS could go to financial institutions in the Lake Tahoe area to obtain a check or checks that were going to be used to make a payment on WALDEMAR RATZLAF'S gambling debt to the High Sierra Casino.

h. On October 27, 1988, High Sierra Casino Cage Manager, RON HUNT agreed to accompany WALDEMAR RATZLAF AND LORETTA RATZLAF to these financial institutions in the Lake Tahoe area.

i. On October 27, 1988, WALDEMAR RATZLAF, LORETTA RATZLAF, and RON HUNT travelled in the High Sierra Casino limousine to various financial institutions in the Lake Tahoe area.

j. On October 27, 1988, WALDEMAR RATZLAF and LORETTA RATZLAF, with currency, purchased eight $9,500 cashier's checks totalling $76,000 at five different financial institutions all made payable to Resorts Reservations.

k. On October 27, 1988, RON HUNT verbally assisted WALDEMAR RATZLAF and LORETTA RATZLAF whenever bank personnel had any questions or concerns regarding the fact that the RATZLAFS were purchasing cashier's checks with currency.

l. On October 27, 1988, after obtaining these cashier's checks, WALDEMAR RATZLAF, LORETTA RATZLAF, and RON HUNT returned to the High Sierra Casino where these cashier's checks were turned over to the High Sierra Casino as partial payment on WALDEMAR RATZLAF'S gambling debt.

OVERT ACTS

5. In furtherance of the conspiracy, and to effect the objectives thereof, the defendants committed the following overt acts, among others, in the State and Federal District of Nevada, and elsewhere:

a. On or about October 27, 1988, RON HUNT travelled in the High Sierra Casino limousine with WALDEMAR RATZLAF and LORETTA RATZLAF to various financial institutions in the Lake Tahoe area.

b. On or about October 27, 1988, at First Interstate Bank of Nevada, 110 Highway 50, Stateline, Nevada, LORETTA RATZLAF purchased and caused to be purchased with currency Cashier's Check No. 0025832 in the amount of $9,500 made payable to Resorts Reservations.

c. On or about October 27, 1988, at First Interstate Bank of Nevada, 110 Highway 50, Stateline, Nevada,

WALDEMAR RATZLAF purchased and caused to be purchased with currency Cashier's Check No. 0025833 in the amount of $9,500 made payable to Resorts Reservations.

d. On or about October 27, 1988, at Nevada Banking Company, 229 Kingsbury Grade, Stateline, Nevada, LORETTA RATZLAF purchased and caused to be purchased with currency Cashier's Check No. 19539 in the amount of $9,500 made payable to Resort Reservations.

e. On or about October 27, 1988, at Nevada Banking Company, 229 Kingsbury Grade, Stateline, Nevada, WALDEMAR RATZLAF purchased and caused to be purchased with currency Cashier's Check No. 19540 in the amount of $9,500 made payable to Resort Reservations.

f. On or about October 27, 1988, at Truckee River Bank, 3980 Highway 50, South Lake Tahoe, California, WALDEMAR RATZLAF informed a bank employee that he and the woman accompanying him each wished to purchase a cashier's check in the amount of $9,500 with currency. When asked by a bank employee if he and the woman were married, WALDEMAR RATZLAF responded that they (he and LORETTA RATZLAF) were not married.

g. On or about October 27, 1988, at the Truckee River Bank, 3980 Highway 50, South Lake Tahoe, California, RON HUNT informed bank employees that they (the RATZLAFS) would only purchase one cashier's check.

h. On or about October 27, 1988, at Truckee River Bank, 3980 Highway 50, South Lake Tahoe, California, LORETTA RATZLAF purchased and caused to be purchased with currency Cashier's Check No. 61-019974827

in the amount of $9,500 made payable to Resort Reservations.

i. On or about October 27, 1988, at Bank of America, 3344 Lake Tahoe Blvd., South Lake Tahoe, California, WALDEMAR RATZLAF purchased and caused to be purchased with currency Cashier's Check No. 0006225484 in the amount of $9,500 made payable to Resort Reservations.

j. On or about October 27, 1988, at Bank of America, 3344 Lake Tahoe Blvd., South Lake Tahoe, California, LORETTA RATZLAF purchased and caused to be purchased with currency Cashier's Check No. 0006226038 in the amount of $9,500 made payable to Resorts Reservations.

k. On or about October 27, 1988, at Security Pacific Bank, 2850 Highway 50, South Lake Tahoe, California, WALDEMAR RATZLAF purchased and caused to be purchased with currency Cashier's Check No. 04885508 in the amount of $9,500 made payable to Resort Reservations.

l. On or about October 27, 1988, at Security Pacific Bank, 2850 Highway 50, South Lake Tahoe, California, LORETTA RATZLAF did attempt to purchase with currency Cashier's Check No. 04885509 in the amount of $9,500 made payable to Resort Reservations.

m. On or about October 27, 1988, at Security Pacific Bank, 2850 Highway 50, South Lake Tahoe, California, a bank employee, after being informed that WALDEMAR RATZLAF had just purchased a $9,500 cashier's check with currency made payable to Resort Reservations,

informed LORETTA RATZLAF that the bank could not sell her a cashier's check for $9,500 without filing a Currency Transaction Report. RON HUNT responded that no form needed to be filled out because the check was not over $10,000. A bank employee responded that these transactions were suspicious and that the bank would fill out a currency transaction report if they sold LORETTA RATZLAF a cashier's check. At that point, RON HUNT asked for the money back and left the bank with LORETTA RATZLAF.

n. On or about October 27, 1988, at Central Bank, 2161 Lake Tahoe Blvd., South Lake Tahoe, California, LORETTA RATZLAF did attempt to purchase with currency Cashier's Check No. 364536 in the amount of $9,500 made payable to Resort Reservations.

o. On or about October 27, 1988, at Central Bank, 2161 Lake Tahoe Blvd., South Lake Tahoe, California, WALDEMAR RATZLAF did attempt to purchase with currency Cashier's Check No. 364537 in the amount of $9,500 made payable to Ron Hunt.

p. On or about October 27, 1988, at Central Bank, 2161 Lake Tahoe Blvd., South Lake Tahoe, California, after a bank employee informed LORETTA RATZLAF that she intended to file a Currency Transaction Report on LORETTA RATZLAF'S purchase of this cashier's check, RON HUNT asked why a currency transaction report needed to be filled out. After the bank employee explained why a currency transaction report had to be filled out, RON HUNT told LORETTA RATZLAF not to purchase the cashier's check.

In violation of Title 18, United States Code, Section 371.

COUNT TWO

(Structuring of Financial Transactions to Avoid Currency Reporting Requirements)

On or about October 27, 1988, in the State and Federal District of Nevada,

WALDEMAR RATZLAF,
LORETTA RATZLAF,
and
RON HUNT,

defendants herein, did knowingly and willfully, for the purpose of evading the reporting requirements of Title 31, United States Code, Section 5313(a), and Title 31, Code of Federal Regulations, Section 103.22, structure, assist in the structuring, and attempt to structure and assist in the structuring of a currency transaction with First Interstate Bank of Nevada, 110 Highway 50, Stateline, Nevada, a domestic financial institution, by purchasing and causing the purchase with currency First Interstate Bank Cashier's Check No. 0025832 in the amount of $9,500 made payable to Resorts Reservations.

In violation of Title 31, United States Code, Sections 5324(3) and 5322(a) and Title 18, United States Code, Section 2.

COUNT THREE

(Structuring of Financial Transactions to Avoid Currency Reporting Requirements)

On or about October 27, 1988, in the State and Federal District of Nevada,

WALDEMAR RATZLAF,
LORETTA RATZLAF,
and
RON HUNT

defendants herein, did knowingly and willfully, for the purpose of evading the reporting requirements of Title 31, United States Code, Section 5313(a), and Title 31, Code of Federal Regulations, Section 103.22, structure, assist in the structuring, and attempt to structure and assist in the structuring of a currency transaction with First Interstate Bank of Nevada, 110 Highway 50, Stateline, Nevada, a domestic financial institution, by purchasing and causing the purchase with currency First Interstate Bank Cashier's Check No. 0025833 in the amount of $9,500 made payable to Resorts Reservations.

In violation of Title 31, United States Code, Sections 5324(3) and 5322(a) and Title 18, United States Code, Section 2.

COUNT FOUR

(Structuring of Financial Transactions to Avoid Currency Reporting Requirements)

On or about October 27, 1988, in the State and Federal District of Nevada,

WALDEMAR RATZLAF,
LORETTA RATZLAF,
and
RON HUNT,

defendants herein, did knowingly and willfully, for the purpose of evading the reporting requirements of Title 31, United States Code, Section 5313(a), and Title 31, Code of Federal Regulations, Section 103.22, structure, assist in the structuring, and attempt to structure and assist in the structuring of a currency transaction with Nevada Banking Company, 229 Kingsbury Grade, Stateline Nevada, a domestic financial institution, by purchasing and causing the purchase with currency of Nevada Banking Company Cashier's Check No. 19539 in the amount of $9,500 made payable to Resort Reservations.

In violation of Title 31, United States Code, Sections 5324(3) and 5322(a) and Title 18, United States Code, Section 2.

COUNT FIVE

(Structuring of Financial Transactions to Avoid Currency Reporting Requirements)

On or about October 27, 1988, in the State and Federal District of Nevada,

WALDEMAR RATZLAF,
LORETTA RATZLAF,
and
RON HUNT,

defendants herein, did knowingly and willfully, for the purpose of evading the reporting requirements of Title 31, United States Code, Section 5313(a), and Title 31, Code of Federal Regulations, Section 103.22, structure, assist in the structuring, and attempt to structure and assist in the structuring of a currency transaction with Nevada Banking Company, 229 Kingsbury Grade, Stateline, Nevada, a domestic financial institution, by purchasing and causing the purchase with currency Nevada Banking Company Cashier's Check No. 19540 in the amount of $9,500 made payable to Resort Reservations.

In violation of Title 31, United States Code, Sections 5324(3) and 5322(a) and Title 18, United States Code, Section 2.

COUNT SIX

(Interstate Travel in Aid of Racketeering)

On or about October 27, 1988, in the State and Federal District of Nevada and elsewhere,

WALDEMAR RATZLAF,
LORETTA RATZLAF,
and
RON HUNT,

defendants herein, did travel in interstate commerce from Stateline in the State of Nevada to South Lake Tahoe in the State of California, with the intent to promote, manage, establish, and carry on, and to facilitate the promotion, management, establishment and carrying on of an unlawful activity, said unlawful activity being the structuring of financial transactions to avoid the currency reporting requirements in violation of Title 31, United States Code, Sections 5324(3) and 5322(a), and thereafter did perform and attempt to perform acts to promote, manage, establish and carry on, and to facilitate the promotion, management, establishment, and carrying on of said unlawful activity.

In violation of Title 18, United States Code, Section 1952(a)(3) and Title 18, United States Code, Section 2.

Dated: Nov. 20, '90

A TRUE BILL:

/s/ Arthur Long
FOREPERSON

LELAND E. LUTFY
United States Attorney

/s/ J. B. Setness
JEFFREY B. SETNESS
Assistant United States Attorney

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff, v. WALDEMAR RATZLAF, LORETTA RATZLAF, and RON HUNT, Defendants.	)	Case No. 6N 90 58 ECR DEFENDANTS' REQUESTED JURY INSTRUCTIONS (Filed Apr. 17, 1991)

Defendants, through their attorneys, request that the following jury instructions, or instructions substantially similar, be given in the trial of this matter.

DATED this 17 day of April, 1991.

Respectfully submitted,

O'CONNELL, GOYAK & DILORENZO

/s/ Kevin O'Connell
Kevin O'Connell, Esq.
of Attorneys for Waldemar Ratzlaf

/s/ Donald C. Hill
Donald C. Hill, Esq.
of Attorneys for Loretta Ratzlaf

DEFENDANTS' REQUESTED JURY INSTRUCTION NO. 11

Structuring, even with intent to evade the currency transaction reporting requirements, is not a crime unless it is willful. An act is willful if it is voluntary and purposeful and committed with the specific intent to do or fail to do what one knows is unlawful. In other words, the government may not convict the Defendants of structuring unless it proves beyond a reasonable doubt that they knew that structuring is illegal.

DEFENDANTS' REQUESTED JURY INSTRUCTION NO. 12

In general, ignorance of the law is not an excuse. Recently, however, the proliferation of statutes and regulations have sometimes made it difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed by the law. Congress has accordingly softened the impact of the common law presumption by making specific intent to violate the law an element of certain federal criminal offenses. Thus, the term "willfully" has been held to carve an exception to the traditional rule. If a statute provides that a person is liable only if the [sic] "willfully" violates the law, ignorance of the law is an excuse.

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 13

In sum, in order for the Defendants to be found guilty of the charge of structuring, the government must prove each of the following elements beyond a reasonable doubt:

First, that the Defendants structured, or assisted in structuring, or attempted to structure or assisted in structuring, any transaction with one or more financial institutions;

Second, that the Defendants acted for the purpose of evading the reporting requirements of Section 5313(a) Title 31 of the United States Code; and

Third, that the Defendants acted willfully.

DEFENDANTS' REQUESTED JURY INSTRUCTION NO. 14

The Defendants do not need to prove that they were ignorant of the law, or that the [sic] misunderstood their legal duties. Instead, the government must prove, beyond a reasonable doubt, that Defendants were not ignorant of the law and that they understood their legal duties. The extent of the Defendants' knowledge and understanding are questions for you, the jury.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

UNITED STATES OF AMERICA,
PLAINTIFF,
VS.
WALDEMAR RATZLAF, LORETTA RATZLAF and RON HUNT,
DEFENDANTS.
_____/

CASE NO. CR-N-90-58-ECR
RENO, NEVADA
APRIL 22, 23, 24, 1991

VOLUME X
TRANSCRIPT OF JURY TRIAL PROCEEDINGS
BEFORE THE HONORABLE EDWARD C. REED, JR.
U.S. DISTRICT JUDGE

• • •

[p. 1786, l. 11] NOW WE'RE UP TO 63, 64 AND 65 AND 66, THE GOVERNMENT PROPOSES 63, DEFENSE HAVE OFFERED 64, 65 AND 66 AND THIS APPEARS TO FALL INTO THE HOYLAND PROBLEM.

66 LOOKS LIKE A SPECIFIC INTENT INSTRUCTION AS IS 65.

64 SPECIFICALLY ADDRESSES THE HOYLAND PROBLEM.

I'LL HEAR FROM THE GOVERNMENT. NOBODY NEED REPEAT THE HOYLAND ARGUMENTS, WE WILL INCORPORATE WHAT WE'VE DONE BEFORE AND WHAT WE HAVE DONE SO FAR TODAY.

MR. SETNESS: ALSO, YOUR HONOR, BECAUSE THERE IS NOT A DIRTH OF AUTHORITY OUT THERE WE LOOKED TO THE SECOND CIRCUIT SCANIO AND I THINK SCANIO GIVES US THE REST OF THIS INSTRUCTION.

MR. O'CONNELL: WHAT ARE WE ON?

THE COURT: 63, 64, 65 AND 66.

ANYTHING FURTHER?

[p. 1787] MR. SETNESS: NO.

THE COURT: DEFENSE.

MR. HILL: ON LINE 17, 18 IT IS WELL SETTLED THAT IGNORANCE OF THE LAW IS NO DEFENSE TO PURPOSEFUL AND INTENTIONAL ACTION. IGNORANCE OF THE FACT THAT THE BANKS HAD THE REPORTING REQUIREMENT ON NUMBER 63 IS IN FACT A DEFENSE.

THE COURT: SO YOU WOULD –

MR. HILL: MISSTATES THE LAW.

THE COURT: IF WE DID GIVE 63 YOU WOULD TAKE OUT THE FIRST SENTENCE IN THE LAST PARAGRAPH?

MR. HILL: YES.

THE COURT: RESERVING YOUR OTHER OBJECTIONS.

ANYBODY ELSE ON THE DEFENSE?

MR. O'CONNELL: YES, YOUR HONOR, I FELT THAT AFTER THE FIRST PARAGRAPH EXHIBIT, RATHER INSTRUCTION 76 SHOULD BE INSERTED.

THE COURT: 76?

MR. O'CONNELL: YES.

THE COURT: YOU WOULD RATHER HAVE IT THERE THAN BY ITSELF?

MR. O'CONNELL: I DON'T WANT IT SO FAR AWAY FROM 63. IF THIS FOLLOWS 63 THAT WOULD BE OKAY.

THE COURT: SO AS FAR AS YOU'RE CONCERNED AS FAR AS THAT PARTICULAR OBJECTION YOU WANT – IF 63 IS GIVEN YOU WANT 76 RIGHT AFTER 63?

[p. 1788] MR. O'CONNELL: YES, SIR.

THE COURT: ANYTHING ELSE ON THE DEFENSE?

MR. O'CONNELL: YES, SIR. IF THE SECOND PARAGRAPH IS GOING TO STAY IN THAT THE GOVERNMENT DOES NOT HAVE TO PROVE THAT THE DEFENDANTS KNEW STRUCTURING WAS UNLAWFUL. I THINK SOMETHING TO THE EFFECT THAT IF YOU ARE SATISFIED THAT THE DEFENDANTS DID NOT KNOW OF THE BANK'S FILING REQUIREMENTS THAT COULD BE A DEFENSE.

THE COURT: WHAT CHANGE WOULD YOU MAKE IN 63 TO MEET THAT OBJECTION?

MR. O'CONNELL: EITHER I WOULD DELETE THE SECOND PARAGRAPH OR I WOULD ADD ANOTHER SENTENCE, "HOWEVER, THE DEFENDANTS' LACK OF KNOWLEDGE OF THE BANK'S REPORTING REQUIREMENTS –

THE COURT: WAIT A SECOND NOW.

MR. O'CONNELL: THE BANK'S REPORTING REQUIREMENTS COULD BE A DEFENSE.

THE COURT: ANYTHING ELSE ON THE DEFENSE SIDE?

ANYTHING ELSE BY THE GOVERNMENT?

MR. SETNESS: YES, YOUR HONOR. WE WOULD HAVE NO OBJECTION TO PUTTING 76 BEHIND 63. THE DEFENDANTS OFFER, HOWEVER THE DEFENDANTS' LACK OF KNOWLEDGE, THAT'S ALMOST LIKE A DIRECTED VERDICT. WE DON'T BELIEVE THERE WAS A LACK OF KNOWLEDGE AND THIS SEEMS REALLY FORCEFUL, HOWEVER THE DEFENDANTS' LACK OF KNOWLEDGE OF THE BANK'S REPORTING [p. 1789] REQUIREMENTS COULD BE A DEFENSE. THAT'S TOO STRONG LEANING TOWARD SOMEHOW THEY DO LACK THIS KNOWLEDGE WHICH THE GOVERNMENT BELIEVES THEY DID HAVE.

THE COURT: HOW WOULD YOU REWORD WHAT MR. O'CONNELL DID TO OVERCOME THAT OBJECTION?

MR. SETNESS: SOMEHOW IF WE CAN LOOK AT 61, YOUR HONOR, THE FIRST ELEMENT, SOMEHOW FASHION SOMETHING OUT OF THAT. BUT THAT GOES –

THE COURT: SUPPOSE YOU SAID HOWEVER IF THE DEFENDANT – HOWEVER IF A DEFENDANT LACKED KNOWLEDGE.

MR. SETNESS: HOWEVER IF THE DEFENDANT DID NOT HAVE KNOWLEDGE OF THE FINANCIAL INSTITUTION –

THE COURT: WAIT A SECOND NOW. HOWEVER.

MR. SETNESS: IF A DEFENDANT DID NOT HAVE KNOWLEDGE OF A FINANCIAL INSTITUTION'S DUTY –

THE COURT: STOP. YOU DON'T LIKE BANK?

MR. SETNESS: THAT'S FINE, YOUR HONOR.

THE COURT: HOWEVER, IF A DEFENDANT DID NOT HAVE KNOWLEDGE –

MR. SETNESS: OF A BANK'S.

THE COURT: OF A BANK'S REPORTING REQUIREMENTS.

MR. SETNESS: OR BANK'S DUTY TO REPORT CURRENCY TRANSACTIONS –

THE COURT: HOLD IT.

ALL RIGHT.

[p. 1790] MR. SETNESS: HOWEVER IF THE DEFENDANT DID NOT HAVE KNOWLEDGE OF A BANK'S DUTY TO REPORT CURRENCY TRANSACTIONS IN EXCESS OF TEN THOUSAND DOLLARS THAT MAY BE CONSIDERED A DEFENSE.

THE COURT: WHAT ABOUT ABOUT THAT, MR. O'CONNELL?

MR. O'CONNELL: HOW ABOUT IF A DEFENDANT DID NOT HAVE KNOWLEDGE OR UNDERSTANDING OF THE BANK'S DUTY TO REPORT CURRENCY TRANSACTIONS IN EXCESS OF TEN THOUSAND DOLLARS.

THE COURT: I'M READY TO MAKE THE RULING. I DON'T THINK WE SHOULD PUT IN UNDERSTANDING. WE'RE LOOKING AT THE ESSENTIAL ELEMENTS AND IT SAYS KNOWLEDGE RATHER THAN UNDERSTANDING. WE WILL GIVE 63 WITH THE CHANGES I WILL STATE IN A MOMENT. WE WILL REJECT 64, 65, 66.

LET ME HEAR FROM THE GOVERNMENT ON 76.

MR. SETNESS: I BELIEVE THAT WE HAVE ADEQUATELY COVERED IN 63, YOUR HONOR, WHAT KNOWINGLY AND WILLFUL IS AND THIS, IT'S MY UNDERSTANDING THIS IS JUST DICTA AND THIS APPEARS TO ADD SORT OF AN EXTRA DIMENSION, SORT OF DELIBERATE INTENTION WHICH I THINK WOULD BE CONFUSING WITH SIXTY THREE WHICH THE COURT IS GIVING AND IT APPEARS THE COURT HAS BENT OVER BACKWARDS TO MAKE SURE THAT WE GET IN THIS LANGUAGE ABOUT LACK OF

KNOWLEDGE ABOUT THE BANK'S REPORTING REQUIREMENT, I THINK WE'RE COVERED.

THE COURT: ALL RIGHT, DEFENSE ON 76.

MR. O'CONNELL: IT COMES FROM HOYLAND, YOUR HONOR. [p. 1791] WE'RE KIND OF BOXED IN IF CHEEK IS NOT ACCEPTED, AT LEAST WE CAN GET SOME OF THE LIMITING LANGUAGE OUT OF HOYLAND.

AND THIS CONCEPT, SPECIFICALLY I ASKED QUESTIONS USING THIS TERM TO TRY TO FASHION MY EXAMINATION OR CROSS EXAMINATION INTO THE RESTRICTIONS THE COURT FASHIONED DURING THE – WHEN THE ISSUE FIRST CAME UP OF SPECIFIC INTENT.

THE COURT: I'M READY TO MAKE THE RULING ON THIS. WE WILL GIVE 76 AND WE WILL REPOSITION IT SO IT WILL COME RIGHT AFTER 63. IT APPEARS IT DOES COME OUT OF HOYLAND. IT APPEARS IT IS INSTRUCTIVE AS TO THE LAW.

63 WILL HAVE THE FOLLOWING CHANGES IN IT. WE WILL INSERT IN LINE 13.5 AFTER 5322(a) THE FOLLOWING, HOWEVER, IF A DEFENDANT DID NOT HAVE KNOWLEDGE OF A BANK'S DUTY TO REPORT CURRENCY TRANSACTIONS IN EXCESS OF TEN THOUSAND DOLLARS THAT MAY BE CONSIDERED A DEFENSE.

WE WILL ALSO TAKE OUT THE IGNORANCE OF THE LAW INSTRUCTION LINE 17 AND 18, THAT ONE SENTENCE STARTING WITH IT IS WELL SETTLED.

I'LL ASK YOU, MR. MORRISSEY, ARE YOU STRAIGHT ON THIS?

THE BAILIFF: YES, I AM.

MR. SETNESS: YOUR HONOR, DOES 76 FOLLOW 63?

THE COURT: YES.

MR. SETNESS: THANK YOU, YOUR HONOR. [l. 23]

* * *

[p. 2017, l. 4] I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

/s/ Ron Caughron-Flannigan — 9/20/91
RON CAUGHRON-FLANNIGAN, CM, CSR — DATE
OFFICIAL COURT REPORTER

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

UNITED STATES OF AMERICA,
PLAINTIFF,
VS.
WALDEMAR RATZLAF, and
LORETTA RATZLAF,
DEFENDANTS.
_____/

CASE NO.
CR-N-90-58-ECR
RENO, NEVADA
APRIL 23, 1991

VOLUME XII
TRANSCRIPT RE READING OF INSTRUCTIONS
BEFORE THE HONORABLE EDWARD C. REED, JR.
U.S. DISTRICT JUDGE

* * *

[p. 2126, l. 6] THE ESSENTIAL ELEMENTS REQUIRED TO BE PROVEN BEYOND A REASONABLE DOUBT IN ORDER TO ESTABLISH THE OFFENSES CHARGED IN COUNTS TWO THROUGH FIVE OF THE INDICTMENT, WHICH ARE VIOLATIONS OF TITLE 31, UNITED STATES CODE, SECTION 5324(3) AND 5322(a) AS DEFINED IN TITLE 31, CODE OF FEDERAL REGULATIONS, SECTIONS 103.21 AND 103.22(a)(1), ARE AS FOLLOWS:

FIRST, THE DEFENDANTS HAD KNOWLEDGE OF A FINANCIAL INSTITUTION'S DUTY TO REPORT CURRENCY TRANSACTIONS IN EXCESS OF TEN THOUSAND DOLLARS.

SECOND, WITH SUCH KNOWLEDGE, THE DEFENDANTS KNOWINGLY AND WILLFULLY STRUCTURED

OR ASSISTED IN STRUCTURING OR ATTEMPTED TO STRUCTURE OR ASSIST IN STRUCTURING A CURRENCY TRANSACTION.

THIRD, THE PURPOSE OF THE STRUCTURED OR ATTEMPTED TRANSACTION WAS TO EVADE THE TRANSACTION REPORTING REQUIREMENTS

AND, FOURTH, THE STRUCTURED TRANSACTIONS INVOLVED ONE OR MORE DOMESTIC FINANCIAL INSTITUTIONS.

AN ACT IS KNOWINGLY – LET ME START OVER. AN ACT IS DONE KNOWINGLY AND WILLFULLY FOR THE PURPOSES OF TITLE 31, UNITED STATES CODE, SECTION 5324(3) AND 5322(a), IF THE [p. 2127] DEFENDANTS, WITH KNOWLEDGE OF A FINANCIAL INSTITUTION'S DUTY TO REPORT CURRENCY TRANSACTIONS IN EXCESS OF TEN THOUSAND DOLLARS, VOLUNTARILY OR INTENTIONALLY STRUCTURED OR ASSISTED IN THE STRUCTURING OR ATTEMPTED TO STRUCTURE OR ASSIST IN THE STRUCTURING A CURRENCY TRANSACTION WITH THE PURPOSE OF EVADING THE CURRENCY REPORTING REQUIREMENT.

THE GOVERNMENT DOES NOT HAVE TO PROVE THAT THE DEFENDANTS KNEW THE STRUCTURING WAS UNLAWFUL NOR DOES THE GOVERNMENT HAVE TO PROVE THAT THE DEFENDANTS KNEW OF THE EXISTENCE OF THE LAW WHICH THEY ARE CHARGED WITH BREAKING, TITLE 31, UNITED STATES CODE, SECTIONS 5324(3) AND 5322(a). HOWEVER, IF A DEFENDANT DID NOT HAVE KNOWLEDGE OF A BANK'S DUTY TO REPORT CURRENCY

TRANSACTIONS IN EXCESS OF TEN THOUSAND DOLLARS, THAT MAY BE CONSIDERED A DEFENSE.

IT IS NOT A DEFENSE THAT THE DEFENDANTS DID NOT KNOW THAT STRUCTURING ITSELF IS A VIOLATION OF LAW OR OF THE EXISTENCE OF TITLE 31, UNITED STATES CODE, SECTIONS 5324(3) AND 5322(a).

IF YOU FIND THAT STRUCTURING OCCURRED, AND WAS KNOWINGLY AND WILLFULLY ENGAGED IN BY DEFENDANTS FOR THE SPECIFIC PURPOSE OF EVADING A REPORTING REQUIREMENT THAT WAS KNOWN BY THE DEFENDANTS TO EXIST, THAT IS SUFFICIENT.

ONLY A PERSON WHO HAS DELIBERATE INTENTION TO FRUSTRATE THE REPORTING BY THE BANKS CAN BE GUILTY OF THE OFFENSE OF STRUCTURING. [l. 25]

• • •

[p. 2139, l. 13] I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

/s/ Ron Caughron-Flannigan 11/6/91
RON CAUGHRON-FLANNIGAN, CM, CSR DATE
OFFICIAL COURT REPORTER

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WALDEMAR RATZLAF, LORETTA RATZLAF, and

Defendants.

_____/

CR-N-90-58-ECR

JOINT NOTICE OF APPEAL

(Filed Jul. 10, 1991)

NOTICE IS HEREBY GIVEN that Waldemar Ratzlaf and Loretta Ratzlaf, Defendants above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 8th day of July, 1991.

/s/ Donald Cavin Hill
DONALD CAVIN HILL, ESQ.
485 West Fifth Street
Reno, Nevada 89503
(702) 323-7758
Attorney for Loretta Ratzlaf

/s/ Kevin O'Connell
KEVIN O'CONNELL, ESQ.
800 One Financial Center
121 S.W. Morrison Street
Portland, Oregon 97204-3138
(503) 227-2902
Attorney for Waldemar Ratzlaf

UNITED STATES DISTRICT COURT
_____ District of NEVADA

UNITED STATES OF AMERICA

V.

WALDEMAR RATZLAF

(Name of Defendant)

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

(Filed July 12, 1991)

Case Number: CR-N-90-58-ECR

KEVIN O'CONNELL
Defendant's Attorney

THE DEFENDANT:

[ ] pleaded guilty to count(s) _____

[X] was found guilty on count(s) 1, 2, 3, 4, 5 & 6 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18:371	Conspiracy	October, 1988	1
31:5324(3) & 5322	Structuring of Financial Transactions to Avoid Currency Reporting Requirements	October, 1988	2,3,4,5
18:1952(a)(3)	Interstate Travel in Aid of Racketeering	October, 1988	6
18:2	Aiding & Abetting	October, 1988	2,3,4,5,6

The defendant is sentenced as provided in pages 2 through 6* of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s).

[ ] Count(s) _____ (is) (are) dismissed on the motion of the United States.

[X] It is ordered that the defendant shall pay a special assessment of $ 300.00 for count(s) 2, 3, 4, 5, 6, which shall be due [X] immediately [ ] as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

* Each separate page is signed and dated by the presiding judicial officer.

Defendant's Soc. Sec. No.: 542-36-1181

Defendant's Date of Birth: 12/24/36

Defendant's Mailing Address:

7515 S. E. 116th

Portland, OR 97266

Defendant's Residence Address:

Same

July 8, 1991
Date of Imposition of Sentence

/s/ Edward C. Reed
Signature of Judicial Officer

EDWARD C. REED, JR., CHIEF USDJ
Name & Title of Judicial Officer

July 11, 1991
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of FIFTEEN (15) MONTHS AS TO EACH OF COUNTS 1, 2, 3, 4,5 & 6. SENTENCES ARE TO RUN CONCURRENTLY TO EACH OTHER.

Defendant shall receive credit for all time served in federal custody in connection with these charges.

Counsel has informed the Court that he will file a notice of appeal. If said Notice of Appeal is filed, the sentence is stayed pending completion of the appeal.

[XX] The court makes the following recommendations to the Bureau of Prisons: That defendant be placed at the Sheridan, Oregon facility so as to be near his family and his son who is ill.

[ ] The defendant is remanded to the custody of the United States marshal.

[ ] The defendant shall surrender to the United States marshal for this district.

[ ] at ___ a.m. p.m. on _____.

[ ] as notified by the United States marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

[ ] before 2 p.m. on _____

[ ] as notified by the United States marshal.

[ ] as notified by the probation office.

Dated this 11th day of July, 1991.

/s/ Edward C. Reed
Chief, U. S. District Judge

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
United States Marshal

By _____

_____

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of THREE (3) YEARS.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the

term of supervised release. The defendant shall comply with the following additional conditions:

[ ] The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

[ ] The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

[XX] The defendant shall not possess a firearm or destructive device.

See Page 4 for Additional Conditions of Supervised Release.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the

probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Dated this 11th day of July, 1991.

/s/ Edward C. Reed
Chief, U. S. District Judge

RESTITUTION, FORFEITURE, OR OTHER PROVISIONS OF THE JUDGMENT

Additional Conditions of Supervised Release:

Defendant shall pay a fine in the amount of $5,000.00.

Defendant shall pay an additional fine pursuant to Section 5E1.2(i) of the Sentencing Guidelines which will be sufficient to pay the Government for costs of incarceration and supervised release. Defendant shall pay the sum of $18,000.00 to pay for the costs of his incarceration, together with the sum of $3,300.00 to pay for the costs of his supervision.

The total fine and additional fine will be $26,300.00.

All of said fines are payable within 120 days. If a Notice of Appeal is filed, the requirement to pay the fines will be stayed.

Defendant shall not incur any new credit charges or any additional lines of credit without authorization from his supervising probation officer, and shall provide his supervising probation officer with any requested financial information.

Dated this 11th day of July, 1991.

/s/ Edward C. Reed
Chief, U. S. District Judge

FINE

The defendant shall pay a fine of $ 26,300.00. The fine includes any costs of incarceration and/or supervision.

[X] This amount is the total of the fines imposed on individual counts, as follows:

1, 2, 3, 4, 5 & 6.

[ ] The court has determined that the defendant does not have the ability to pay interest. It is ordered that:

[ ] The interest requirement is waived.

[ ] The interest requirement is modified as follows:

This fine plus any interest required shall be paid: Within 120 days. If a Notice of Appeal is filed this requirement is stayed.

[ ] in full immediately.

[ ] in full not later than _____.

[ ] in equal monthly installments over a period of ___ months. The first payment is due on the date of this judgment. Subsequent payments are due monthly thereafter.

[ ] in installments according to the following schedule of payments:

Dated this 11th day of July, 1991.

/s/ Edward C. Reed
Chief, U. S. District Judge

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

STATEMENT OF REASONS

[XX] The court adopts the factual findings and guideline application in the presentence report.

OR

[ ] The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 13

Criminal History Category: I

Imprisonment Range: 12 to 18 months

Supervised Release Range: 2 to 3 years

Fine Range: $ 3,000 to $ 30,000

[ ] Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: $ _____

[ ] Full restitution is not ordered for the following reason(s):

[X] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.
See Transcript of the Statement of Reasons

OR

[ ] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

The sentence departs from the guideline range

[ ] upon motion of the government, as a result of defendant's substantial assistance.

[ ] for the following reason(s):

Dated this 11th day of July, 1991.

/s/ Edward C. Reed
Chief, U. S. District Judge

UNITED STATES DISTRICT COURT
_____ District of NEVADA

UNITED STATES OF AMERICA

V.

LORETTA RATZLAF,

(Name of Defendant)

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

(Filed July 12, 1991)

Case Number: CR-N-90-58-ECR

DONALD CAVIN HILL
Defendant's Attorney

THE DEFENDANT:

[ ] pleaded guilty to count(s) _____

[X] was found guilty on count(s) ONE (1) and SIX (6) after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18:371	Conspiracy	October, 1988	1
18:1952(a)(3)	Interstate Travel in Aid of Racketeering,	October, 1988	6
18:2	Aiding & Abetting	October, 1988	6

The defendant is sentenced as provided in pages 2 through 4* of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[X] The defendant has been found not guilty on count(s) 2, 3, 4 & 5 and is discharged as to such count(s).

[ ] Count(s) _____ (is) (are) dismissed on the motion of the United States.

[X] It is ordered that the defendant shall pay a special assessment of $ 100.00, for count(s) 1 & 6, which shall be due [XX] immediately [ ] as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

* Each separate page is signed and dated by the presiding judicial officer.

Defendant's Soc. Sec. No.:
541-50-1527

Defendant's Date of Birth:
6/4/44

Defendant's Mailing Address:

7515 S. E. 116th

Portland, OR 97266

Defendant's Residence Address:

Same

July 8, 1991
Date of Imposition of Sentence

/s/ Edward C. Reed
Signature of Judicial Officer

EDWARD C. REED, JR., CHIEF USDJ
Name & Title or Judicial Officer

July 12, 1991
Date

PROBATION

The defendant is hereby placed on probation for a term of FIVE (5) YEARS EACH AS TO COUNTS ONE (1) AND SIX (6), sentences shall run concurrently with each other.

While on probation, the defendant shall not commit another Federal, state, or local crime, shall not illegally possess a controlled substance, and shall not possess a firearm or destructive device. The defendant also shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a fine or a restitution obligation, it shall be a condition of probation that the defendant pay any such fine or restitution. The defendant shall comply with the following additional conditions:

Defendant shall serve a period of TEN (10) MONTHS in home detention and shall be restricted to her place of residence during all non-working hours. Defendant shall be permitted to take her son to the doctor and the hospital.

Defendant shall pay a fine in the amount of $1,000.00.

Defendant shall pay an additional fine pursuant to Section 5E1.2(i) of the Sentencing Guidelines which will be sufficient to pay the Government for costs of supervision and home detention. Defendant shall pay the sum of $5,500.00 to pay for the costs of supervision, together with the sum of $1,400.00 to pay for the costs of her home detention.

The total fine and additional fines will be $7,900.00.

All of said fines are payable within 120 days. If a Notice of Appeal is filed, the requirement to pay the fines will be stayed.

Defendant shall not incur any new credit charges or any additional lines of credit without authorization from her supervising probation officer, and shall provide his supervising probation officer with any requested financial information.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Dated this 12 day of July, 1991.

/s/ Edward C. Reed
Edward C. Reed
Chief, U. S. District Judge

FINE

The defendant shall pay a fine of $ 7,900.00. The fine includes any costs of ~~incarceration and/or~~ supervision and home detention.

[XX] This amount is the total of the fines imposed on individual counts, as follows:

1 and 6

[ ] The court has determined that the defendant does not have the ability to pay interest. It is ordered that:

[ ] The interest requirement is waived.

[ ] The interest requirement is modified as follows:

This fine plus any interest required shall be paid: Within 120 days. If a Notice of Appeal is filed this requirement is stayed.

[ ] in full immediately.

[ ] in full not later than _____.

[ ] in equal monthly installments over a period of ___ months. The first payment is due on the date of this judgment. Subsequent payments are due monthly thereafter.

[ ] in installments according to the following schedule of payments:

Dated this 12 day of July, 1991.

/s/ Edward C. Reed
Edward C. Reed
Chief, U. S. District Judge

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

STATEMENT OF REASONS

[XX] The court adopts the factual findings and guideline application in the presentence report.

OR

[ ] The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 11

Criminal History Category: I

Imprisonment Range: 8 to 14 months

Supervised Release Range: 2 to 3 years

Fine Range: $ 2,000 to $ 20,000

[ ] Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: $ _____

[ ] Full restitution is not ordered for the following reason(s):

[ ] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

[ ] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

The sentence departs from the guideline range

[ ] upon motion of the government, as a result of defendant's substantial assistance.

[X] for the following reason(s): Due to defendant's 14-year old son's illness with lymphoblastic leukemia, which needs treatment every nine (9) days and who needs the support of the defendant for the next two (2) years.

Dated this 12 day of July, 1991.

/s/ Edward C. Reed
Edward C. Reed
Chief, U. S. District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES
OF AMERICA,

Plaintiff,

vs.

LORETTA RATZLAF

Defendants.

_____/

CR-N-90-58-ECR

NOTICE OF APPEAL
(Filed Aug. 14, 1991)

NOTICE IS HEREBY GIVEN that Loretta Ratzlaf, Defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 8th day of July, 1991.

A Joint Notice Of Appeal was originally filed in this matter on July 10, 1991 on behalf of Loretta Ratzlaf and Waldemar Ratzlaf by their respective attorneys, Kevin O'Connell and Donald Cavin Hill.

Mr. Donald Cavin Hill was notified by the Ninth Circuit Court Of Appeals on August 13, 1991 that there would be a necessity to file a second appeal notice and $105.00 fee on behalf of Mrs. Ratzlaf and they would use the $105.00 fee and the prior filing on behalf of Mr. Ratzlaf.

DATED this 14th day of August, 1991.

/s/ Donald Cavin Hill
DONALD CAVIN HILL, ESQ.
485 West Fifth Street
Reno, Nevada 89503
(702) 323-7758
Attorney for Loretta Ratzlaf

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. WALDEMAR RATZLAF, *Defendant-Appellant.*	No. 91-10397 D.C. No. CR-N-90-58-ECR OPINION
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. LORETTA RATZLAF, *Defendant-Appellant.*	No. 91-10429 D.C. No. CR-N-90-58-ECR

Appeal from the United States District Court
for the District of Nevada
Edward C. Reed, Jr., Chief Judge, Presiding

Argued and Submitted
July 14, 1992 – San Francisco, California

Filed October 6, 1992

Before: J. Clifford Wallace, Chief Judge, and
Herbert Y. C. Choy and Cecil F. Poole, Circuit Judges.

Opinion by Judge Poole

SUMMARY

Criminal Law and Procedure/Criminal Acts/Defenses

Affirming district court judgments of conviction for structuring financial transactions to avoid currency reporting requirements, the court of appeals held that the recent Supreme Court decision in *Cheek v. United States* did not overrule the Ninth Circuit's holding in *United States v. Hoyland* that the government had to prove that a defendant knew such structuring was illegal to convict.

Appellants Waldemar and Loretta Ratzlaf were high-time gamblers. To facilitate their enjoyment of such activity, they established lines of credit at numerous casinos in New Jersey and Nevada. Mr. Ratzlaf, a regular customer and a "high roller" at the casinos, bet, won, and lost large amounts of money. A bad night at a Nevada casino made Mr. Ratzlaf lose $160,000. The Ratzlafs tendered payment to the casino in cash because Mr. Ratzlaf did not want the casino to fill out any written report of the payment transaction. However, the casino refused to accept cash payment on those terms and informed the Ratzlafs that the casino would be required to fill out a "currency transaction report" since more than $10,000 in currency was involved. Subsequently, the Ratzlafs obtained various cashiers checks in amounts of less than $10,000 to repay the casino debt. A federal grand jury indicted the Ratzlafs for structuring financial transactions to avoid currency reporting requirements. A jury convicted the Ratzlafs. The Ratzlafs argued that the jury instructions misstated the elements of the crime of structuring financial transactions to avoid the currency reporting requirements.

[1] The court noted that it recently rejected in *Hoyland* the argument that an individual cannot be convicted of "structuring" unless the government proves that he or she knew such activities were illegal. In so holding, the court agreed with the Second Circuit's holding to that effect in *Scanio*. **[2]** The court rejected the Ratzlafs' argument that the Supreme Court's recent decision in *Cheek v. United States* overruled *Hoyland* and *Scanio*. **[3]** The court noted that other circuits have rejected the notion that *Cheek* changes the *Hoyland* and *Scanio* conclusions. **[4]** However, the court disagreed with the New Hampshire district court holding in *Aversa* that the defendant there could not be convicted of structuring because he did not know that it was illegal. First, the currency structuring and reporting statutes are not "complex" in the sense that the *Cheek* court used that term in referring to the federal tax laws. **[5]** Second, the court did not think the rule of lenity applies to the money laundering statutes. Here, the language of the statute in question was not ambiguous, and even a strict reading of the statute supports, not undercuts, the government's proffered interpretation. **[6]** The court thus concluded that *Hoyland* and *Scanio* rest firmly upon Congress' intent in proscribing structuring. After the 1986 amendments to the statute, one could be prosecuted for violating section 5324(3) if he or she willfully structured transactions. **[7]** If a defendant knows that the bank must report a currency transaction and then intentionally acts in a way to prevent that, he has acted willfully.

COUNSEL

Kevin O'Connell, O'Connell, Goyak & DiLorenzo, Portland, Oregon, and Donald C. Hill, Reno, Nevada, for the defendants-appellants.

Jeffrey B. Setness and William M. Welch, Assistant United States Attorneys, Reno Nevada, for the plaintiff-appellee.

OPINION

POOLE, Circuit Judge:

Defendants Loretta and Waldemar Ratzlaf appeal their convictions for structuring financial transactions to avoid currency reporting requirements, a violation of 31 U.S.C. §§ 5322(a), 5324(3). They argue that *Cheek v. United States*, 111 S.Ct. 604 (1991), overrules our holding in *United States v. Hoyland*, 914 F.2d 1125 (9th Cir. 1990), that the government does not have to prove that the defendants knew structuring is illegal to convict. We have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm.

I

Defendants Waldemar and Loretta Ratzlaf, residents of Portland, Oregon, are gamblers, To facilitate their enjoyment of such activity, they established lines of credit at fifteen casinos in New Jersey and Nevada. Mr. Ratzlaf, a regular customer and a "high roller" at the casinos, bet, won, and lost large amounts of money. The events that led to this case began on October 20th, 1988, at the High Sierra casino in Reno, Nevada. Mr. Ratzlaf had a bad night, losing $160,000 playing blackjack. Fortunately for

him, the casino had increased his credit line from $25,000 to $160,000 earlier that day. When the casino learned about Lady Luck's unkind treatment of Mr. Ratzlaf, it granted him one week to pay back the $160,000 balance.

On October 27, 1988, the Ratzlafs returned to the High Sierra casino carrying enough cash to pay their debt. Shift manager Tony Mercurio informed his boss, casino Vice-President Stephen Allmaras, that Mr. Ratzlaf did not want the casino to fill out any written report of the payment transaction. Allmaras refused to accept cash payment on those terms and informed the Ratzlafs that he would be required to fill out a "currency transaction report" (CTR) since more than $10,000 in currency was involved. Allmaras told Mr. Ratzlaf that he would be happy to accept as an alternative a single cashier check for the amount due and suggested to Mr. Ratzlaf that he contact his bank in Oregon to make the necessary arrangements. Allmaras also made available to the Ratzlafs a limousine and assigned employee Ron Hunt to transport them to the local bank that would provide the check.

On October 28, 1988, Hunt escorted the Ratzlafs to several banks in and near Stateline, Nevada and South Lake Tahoe, California. At each bank the Ratzlafs used cash to purchase, or attempt to purchase, cashiers checks in amounts less than $10,000. Armed with the cashiers checks thus obtained, the Ratzlafs returned to the High Sierra casino and submitted them as partial payment on their gambling debt. However, not all of the $160,000 debt was eliminated. Accordingly, on November 28, 1988, Mr. Ratzlaf gave Ruby Langston, a former employee at a restaurant owned by the Ratzlafs, $5,000 in currency and

asked her to purchase a single cashiers check for that amount. Langston purchased the cashiers check at First Interstate Bank in Portland. On the same day Mr. Ratzlaf also gave Lena Koseniensky $5,000 in currency and asked her to perform a similar errand. Koseniensky did so at the same bank Langston had visited. Two days later, Mr. Ratzlaf gave George Chanouzas $7,500 in cash and asked him to buy a single cashiers check. Chanouzas also performed this transaction at the First Interstate Bank in Portland. Between November 29 and December 5, 1988, the Ratzlafs separately and together used currency to purchase five cashiers checks, each in amounts less than $10,000, from two other Portland banks.

When asked by IRS investigators why they had paid for the cashiers checks with cash, the Ratzlafs asserted that the money was gambling proceeds and that the High Sierra casino asked them to "pay off the marker" with cashiers checks. Mrs. Ratzlaf also stated that the casino management instructed them to purchase cashiers checks in small amounts so that the casino would not be required to complete a CTR. Mr. Ratzlaf testified at trial that the couple kept gambling winnings and cash revenues from their restaurant hidden in a piece of furniture in their bedroom. Allmaras denied suggesting to the Ratzlafs that they visit various banks and purchase cashiers checks in amounts less than $10,000.

On November 20, 1990 a federal grand jury indicted the Ratzlafs and Hunt. The trio was charged with (1) conspiracy to structure and assist in structuring financial transactions for the purpose of evading reporting requirements; (2) four counts of structuring currency transactions to evade reporting requirements; and (3) interstate

travel in aid of racketeering. At trial, the district judge instructed the jury as follows on the structuring charges:

> The essential elements required to be proven beyond a reasonable doubt . . . are as follows:
>
> First: The defendants had knowledge of a financial institution's duty to report currency transactions in excess of $10,000;
>
> Second: With such knowledge, the defendants knowingly and willfully structured or assisted in structuring or attempted to structure or assist in structuring a currency transaction;
>
> Third: The purpose of the structured transaction was to evade the transaction reporting requirement;
>
> Fourth: The structured transaction(s) involved one or more domestic financial institutions.
>
> . . . .
>
> An act is done knowingly and willfully for the purpose of [31 U.S.C. §§ 5322(a), 52324(3)] if the defendants, with knowledge of a financial institution's duty to report currency transactions in excess or [sic] $10,000, voluntarily or intentionally structured or assisted in structuring or attempted to structure or assist in structuring a currency transaction with the purpose of evading the currency reporting requirements.
>
> The government does not have to prove that the defendants knew that structuring was unlawful[,] nor does the government have to prove that the defendants knew of the existence

> of the law which they are charged with breaking. . . . However, if a defendant did not have knowledge of a bank's duty to report currency transactions in excess or [sic] $10,000, that may be considered a defense.
>
> It is not a defense that the defendants did not know that "structuring" itself is [illegal] or of the existence of [31 U.S.C. §§ 5322(a), 5324(3)].

The jury convicted Mr. Ratzlaf on all counts and Mrs. Ratzlaf on the conspiracy and interstate travel charges.[1] Mr. Ratzlaf was sentenced to fifteen months in federal prison on each count, to run concurrently; three years supervised release; and to pay a fine of $26,300 and a special assessment of $300. Mrs. Ratzlaf was sentenced to five years probation on each count, to run concurrently and to include ten months home detention, and to pay a $7,900 fine and a $100 special assessment. The defendants filed timely notices of appeal on July 10 and August 14, 1991.

II

We review de novo the question whether the jury instructions in this case misstated the elements of the crime of structuring financial transactions to avoid the currency reporting requirements. *United States v. Durham*, 941 F.2d 886, 890 (9th Cir. 1991). "We review a claim of error in a jury instruction by looking to 'the adequacy of

---

[1] Hunt was convicted on the conspiracy count, two structuring counts, and the interstate travel charge. His convictions are not at issue in this appeal.

> the entire charge . . . in the context of the whole trial.' " *United States v. Mundi*, 892 F.2d 817, 818 (9th Cir. 1989), *cert. denied*, 111 S.Ct. 1072 (1991) (quoting *United States v. Marabelles*, 724 F.2d 1374, 1382 (9th Cir. 1984)).

III

31 U.S.C. § 5324 provides:

> No person shall for the purpose of evading the reporting requirements of section 5313(a) with respect to such transaction –
>
> . . .
>
> (3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions.

Individuals that engage in such "structuring" activities are subject to criminal penalties. 31 U.S.C. § 5322(a) ("A person *willfully* violating this subchapter or a regulation prescribed [there]under . . . shall be fined . . . or imprison[ed] . . . or both.") (emphasis added).[2]

---

[2] The Bank Secrecy Act of 1970, 31 U.S.C. § 5313(a), and associated regulations promulgated under its authority, 31 C.F.R. § 103.22(a)(1), obligate financial institutions to report to the government currency transactions involving more than $10,000. Congress enacted this law because individuals involved in criminal activity frequently engage in sizeable cash transactions. The reports, called "Currency Transaction Reports" or "CTRs," help law enforcement officers investigate and fight a variety of criminal activity. *See generally* H.R. Rep. No. 975, 91st Cong., 2d Sess., *reprinted in* 1970 U.S.C.C.A.N. 4394, 4396; Rusch, *Hue and Cry in the Counting-House: Some*

[1] We recently rejected an argument that an individual cannot be convicted of "structuring" unless the government proves that he or she knew such activities were illegal:

> Congress had set the reporting requirement for the banks. Congress was aware that several circuits, including ours, had held it no crime to structure deposits so that the reporting requirement would not be triggered. Congress changed that law to make it a crime so to structure with the intent to prevent reporting. To act willfully under the statute is to act with this intent. . . .

United States v. Hoyland, 914 F.2d 1125, 1129-30 (9th Cir. 1990) (internal statutory citations omitted). In so holding, we agreed with *United States v. Scanio*, 900 F.2d 485 (2d Cir. 1990). There, the Second Circuit concluded that knowledge of illegality is not required to convict for "structuring" because such conduct is "affirmative" and "demonstrate[s] an awareness of the legal framework relative to currency transactions which, it is reasonable to conclude, should . . . alert[] [the defendant] to the consequences of his conduct." *Id.* at 490 (citing *United States v.*

Observations on the Bank Secrecy Act, 37 Cath. U.L. Rev. 465, 469-73 (1988).

The Bank Secrecy Act did not apply to bank customers prior to January 1987. Before that time individuals who "structured" transactions to avoid the $10,000 reporting threshold could be prosecuted only for willfully causing a financial institution to fail to file a CTR, 18 U.S.C. § 2(b), for knowingly and willfully concealing a material fact from the government, 18 U.S.C. § 1001, or for conspiracy, 18 U.S.C. § 371. *United States v. Scanio*, 900 F.2d 485, 488 (2d Cir. 1990). As part of the Anti-Drug Abuse Act of 1986, Congress enacted 31 U.S.C. § 5324.

Int'l Minerals & Chem. Corp., 402 U.S. 558, 564-65 (1971), and *United States v. Fierros*, 692 F.2d 1291, 1295 (9th Cir.), *cert. denied*, 462 U.S. 1120 (1983)). The court explained that, unlike other sections of the Bank Secrecy Act,[3] the purpose of section 5324(3) is to protect the government's right to information. To require proof that the defendant knew structuring to be illegal would be inconsistent with this goal. 900 F.2d at 491. *See also United States v. 316 Units of Municipal Securities*, 725 F.Supp. 172, 177-79 (S.D.N.Y. 1989) (civil forfeiture action).

[2] The Ratzlafs argue that the Supreme Court's recent decision in *Cheek v. United States*, 111 S.Ct. 604 (1991), overrules *Hoyland* and *Scanio*. *Cheek* was a criminal tax case. The defendant had been charged with willfully attempting to evade income taxes and with willfully failing to file tax returns, violations of 26 U.S.C. §§ 7201 and 7203. The Court held that willfully means the " 'voluntary, intentional violation of a known legal duty.' " 111 S.Ct. at 610 (citation omitted) (applying and discussing *United States v. Murdock*, 290 U.S. 389, 396 (1933); *United States v. Bishop*, 412 U.S. 346, 360 (1973); and *United States v. Pomponio*, 429 U.S. 10, 12 (1976) (per curiam)).

The Court explained its holding with reference to the tax laws:

---

[3] Specifically, the court addressed the distinction between "willful" as used in section 5324(3) and as employed in 31 U.S.C. § 5316, which proscribes an individual's failure to file "Currency and Monetary Instrument Reports." The *Scanio* court explained that section 5316 "requires individuals to report otherwise innocent transactions. . . . " 900 F.2d at 491.

> Willfulness, as construed by our prior decisions *in criminal tax cases*, requires the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally vi lated that duty. . . . [If] the issue is whether the defendant knew of the duty purportedly imposed by the . . . statute . . . he is accused of violating, . . . the Government [satisfies the knowledge component of the willfulness requirement if it] proves actual knowledge of the pertinent legal duty. . . . But carrying this burden requires negating a defendant's claim of ignorance of the law. . . . This is so because one cannot be aware that the law imposes a duty upon him and yet be ignorant of it, . . . or believe that the duty does not exist.

Id. at 610-11 (emphasis added).

The Court explained that Congress employed the term "willfully" in the criminal tax laws because their "*proliferation* . . . has sometimes made it difficult for the average citizen to *know and comprehend the extent of [their] duties and obligations*" under the tax laws. *Id.* at 609 (emphasis added). The Court noted that it had long construed "willfully" in the criminal tax statutes "as carving out an exception to the traditional rule" that "every person kn[ows] the law." *Id.* The Court does this, according to the *Cheek* majority, because the tax laws are "complex[]." *Id.*

[3] Four federal courts have answered the question whether *Cheek* requires the government to prove a structuring defendant knew that such activity is illegal. In *United States v. Dashney*, 937 F.2d 532 (10th Cir.), *cert.*

denied, 112 S.Ct. 402 (1991), the court rejected the notion that *Cheek* changes the *Hoyland* and *Scanio* conclusions:

> Criminal tax statutes are more analogous to . . . international currency reporting statutes . . . , since entirely innocent actions can lead to violations of the law. [But] Dashney's actions were anything but innocent, as he went to great lengths to avoid the filling out of CTRs in connection with his transactions.

Id. at 540 (internal citations omitted). *See also United States v. Nall*, 949 F.2d 301, 307 (10th Cir. 1991). In *United States v. Rogers*, 962 F.2d 342 (4th Cir. 1992), the court agreed with *Dashney*, holding that the *Cheek* exception is a narrow one. The court emphasized that *Cheek*'s rational is inapplicable to the structuring statute because it is not complex. *Id.* at 344. *See also United States v. Wollman*, 945 F.2d 79, 81 (4th Cir. 1991) (per curiam) (summarily affirming structuring conviction without addressing *Cheek*). Similarly, in *United States v. Brown*, 954 F.2d 1563 (11th Cir. 1992), the court refused to apply the *Cheek* exception to section 5324(3). "[Congress'] intent to facilitate prosecution of money launderers, stands in direct contrast to the . . . holding in *Cheek* that Congress intended to show special deference to Tax Code violators, [because] the tax laws [are complex]." *Id.* at 1569 n.2. *Cf. United States v. Donovan*, 1992 WL 18217, at *4, 1992 U.S. App. LEXIS 1535, *7-*9 (1st Cir., Feb. 6, 1992) (rejecting argument that *Cheek* requires proof of knowledge that failure to report currency transactions exceeding $10,000 is illegal and declaring that "the *Cheek* exception is restricted to tax crimes").

The result was different in *United States v. Aversa*, 762 F.Supp. 441 (D.N.H. 1991). There, the defendants were convicted of structuring after one of the men, Aversa, asked his investment partner and co-defendant Mento to help him conceal proceeds of a legal real estate transaction from his wife, with whom Aversa was engaged in a contentious divorce battle. Aversa asked Mento to allow him to deposit his portion of the real estate revenues in Mento's account and agreed to sign a letter to the IRS stating that the money deposited in Mento's account belonged to Aversa and that Aversa deposited less than $10,000 at a time to avoid arousing IRS suspicion of his income sources and level. The letter was provided to the IRS and Aversa subsequently engaged in transactions involving less than $10,000 on several occasions.

The New Hampshire district court ruled that Aversa could not be convicted of structuring because he did not know that structuring is illegal. The court reached this conclusion for three reasons. First, structuring can be "innocent" behavior in the sense that no concealment of illegal activity is intended or effected. 762 F. Supp. at 446. Second, the court rejected the *Scanio/Hoyland* definition of "willful" because it means that there would be no difference between the proscribed "willful" violations of section 5324 and non-willful violations of section 5324. *Id.* at 447-48. Finally, the court believed that *Cheek*'s reasoning applied because "[w]hile § 5322(a) may not be technically a criminal *tax* law it is certainly a criminal law related to taxation." *Id.* at 447 (emphasis in original). In addition, the court was convinced that the structuring laws are just as complex and "obscure" to the average citizen as are the tax laws. 762 F. Supp. at 447.

[4] We disagree with the *Aversa* court for several reasons. First, the currency structuring and reporting statutes are not "complex" in the sense that the *Cheek* Court used that term in referring to the Internal Revenue Code. The tax laws are "[o]ne of the most esoteric areas of the law . . . [,] replete with 'full-grown intricacies', [where] it is rare that a 'simple, direct statement of the law can be made without caveat.' " *Unites States v. Regan*, 937 F.2d 823, 827 (2d Cir.) (citation omitted), *modified*, 946 F.2d 188 (1991). The tax code's lengthy and complicated list of income sources that are and are not taxable and the conditions under which exemptions and deductions apply are in stark contrast to the *two* things outlawed by the money laundering statutes: failure of a financial institution to report transactions that exceed $10,000; and attempts, successful or unsuccessful, to prevent financial institutions from making the required reports by intentionally avoiding the $10,000 threshold in banking transactions.

[5] Second, we do not think the rule of lenity applies to the money laundering statutes. *Mens rea* is generally required to convict a person for a crime, and where a statute does not clearly specify the mental state required for conviction, courts construe the ambiguity in favor of the defendant. *See United States v. United States Gypsum Co.*, 438 U.S. 422, 437 (1978); *Rewis v. United States*, 401 U.S. 808, 812 (1971). But the language and history of the structuring statute is not ambiguous, and even a "strict" reading of the statute *supports*, not undercuts, the

government's proffered interpretation.[4] *Compare Liparota v. United States*, 471 U.S. 419, 424-25 & n.7 (1985) (noting ambiguity in statute where unclear whether "knowingly" applied to all elements of the offense).

[6] *Hoyland* and *Scanio* rest firmly upon Congress' intent in proscribing structuring. Before the enactment of section 5324(3), several courts, including this one, rejected attempts to impose any criminal liability for structuring financial transactions to avoid reporting requirements.[5] In 1986, Congress decided to close this apparent loophole in the government's information gathering scheme. *See Scanio*, 900 F.2d at 488 (citing S. Rep. No. 433, 99th Cong., 2d Sess. 22 (1986); H.R. Rep. No. 746, 99th Cong., 2d Sess. 18-20 (1986); *Hoyland*, 914 F.2d at 1129; *Dashney*, 937 F.2d at 537-38. When Congress effected this amendment to the money laundering and currency reporting statutes, it did not change the language of section 5322(a). In adding section 5324(3), Congress likewise did *not* specify that a greater "state of mind" would be required to secure a conviction under it than that

---

[4] *Morissette v. United States*, 342 U.S. 246, 261-63 (1952), casts no doubt on this proposition. There, the Court held that, as a general rule, *mens rea* must be assumed a requirement to convict under a statute that codifies a common law crime. Structuring, however, was not a criminal offense at common law. *Hoyland*, 914 F.2d at 1129.

[5] *See, e.g., United States v. Varbel*, 780 F.2d 758, 762 (9th Cir. 1986); *United States v. Anzalone*, 766 F.2d 676, 679-83 (1st Cir. 1985). *But see, e.g., United States v. Tobon-Builes*, 706 F.2d 1092, 1096-1101 (11th Cir. 1983).

established by section 5322. Thus, after the 1986 amendments, one could be prosecuted for violating section 5324(3) if he or she "willfully" structured transactions.[6]

The legislative history of the Anti-Drug Abuse Act clearly indicates that this interpretation of Congressional intent is correct:

> [A] person who converts $18,000 in currency to cashiers checks by purchasing two $9,000 cashier's checks at two different banks or on two different days with the specific intent that the participating bank or banks not be required to file [CTRs] for those transactions, would be subject to potential civil and criminal liability. A person conducting the same transactions for any other reasons . . . would not be subject to liability under the proposed amendment.

S. Rep. No. 433, 99th Cong., 2d Sess. 22 (1986) (quoted in *Dashney*, 937 F.2d at 538).[7]

---

[6] Congress' decision to add section 5324(3) to the United States Code also did not modify the traditional meaning of "willfulness." *viz.*, the defendant intended to do the act with which he is charged. *See Scanio*, 900 F.2d at 489 ("A requirement that the conduct be willful generally means no more than that the person charged with the duty knows what he is doing. It does not mean that, in addition, he must suppose he is breaking the law.") (quoting *American Surety Co. v. Sullivan*, 7 F.2d 605, 606 (2d Cir. 1925) (L. Hand, J.)).

[7] There is little indication that this interpretation of section 5324(3)'s history and purpose is incorrect. One report on the Anti-Drug Abuse Act included a proposal to change "willfully" in section 5322 to "knowingly." H.R. Rep. No. 855, 99th Cong., 2d Sess. 7, 27 (1986) (Report of House Judiciary Committee). The report noted that the term "willfully" has been ascribed different meanings in different statutory contexts and explained that

[7] The *Aversa* court's premise – that a defendant must know of the *reporting requirements* to be convicted of structuring – is therefore correct, but does not support the holding of that case. If a defendant knows that the bank must report a currency transaction and then intentionally acts in a way to prevent that, he has acted "willfully." One does not act "willfully" under section 5322 unless *both* parts of this equation are present. *See Dashney*, 937 F.2d at 539. There is no danger that someone who does *not* know of the reporting requirements could be convicted under that *mens rea* standard; nor is there any way that one who knows of the reporting requirements

---

its meaning in the money laundering statutes was an "actual awareness of the reporting requirement. . . . " *Id.* at 21-22. The Judiciary Committee Report recommended a change to the word "knowingly," explaining that this change would not be intended to change the meaning of the statute. *Id.* The House Committee on Banking, Finance and Urban Affairs issued a report similar to that of the Judiciary Committee. H.R. Rep. No. 746, 99th Cong., 2d Sess. 29 (1986). It stated that "[i]n the criminal context the term "knowingly" means with specific intent to commit a violation of the . . . Act" or "specific intent to commit a crime." *Id.* at 41. The report also suggested a change to the term "knowingly."

We agree with the Tenth Circuit that these committee reports are not helpful. First, the legislation discussed in the Judiciary Committee Report did not contain any prohibition of structuring. *Dashney*, 937 F.2d at 537 n.5. That means the Committee was not contemplating the appropriate state of mind when it was considering structuring. Second, the reports were submitted with bills rejected by Congress. Thus, although Congress did ultimately make changes in the money laundering laws, "it is [not] reasonable to assume that [Congress] adopted the intent of the[se] committee[s]," *Sutherland's Statutory Construction* § 48.06, at 332 (5th ed.).

but who *does not intend* to prevent such reporting can be convicted of structuring. No one can be convicted of "violating" section 5324(3) unless he or she knows of the reporting requirements *and* that he or she is doing something to prevent such reporting.

Finally, this case presents little risk that persons who engaged in "innocent" actions stand unjustly convicted of structuring. The Ratzlafs were aware of the reporting requirements, and the evidence indicates that the Ratzlafs apparently were seeking to avoid payment of their income taxes. The couple took no steps to insure that the IRS would be aware of the assets used to purchase the cashiers checks; denied that they earned money from gambling when in fact they had done so; denied any failure to report gambling income; and apparently hid large amounts of currency in or near their home. The Ratzlafs cannot be compared to an individual involved in perfectly ordinary business transactions who unconsciously breaks the currency laws. *Compare Aversa*, 762 F. Supp. at 446.

IV

Cheek did not overrule *Hoyland*. We join the Fourth, Tenth, and Eleventh Circuits in reaching this holding. Accordingly, the instructions given by the district court were not improper. The defendants' convictions are therefore AFFIRMED.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

April 26, 1993

Mr. John Duncan Ryan
121 S.W. Morrison Street
Suite 800
Portland, OR 97204

Re: Waldemar Ratzlaf and Loretta Ratzlaf v. United States
No. 92-1196

Dear Mr. Ryan:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is granted.

Very truly yours,

/s/ William K. Suter
William K. Suter, Clerk

No. 92-1196

(4)

In The

Supreme Court of the United States

October Term, 1993

WALDEMAR RATZLAF AND LORETTA RATZLAF,

Petitioners,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

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July 1993

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QUESTION PRESENTED

To be guilty of "willfully" structuring a transaction in currency "for the purpose of evading" reporting requirements imposed by law upon financial institutions, must a bank customer have knowledge that such "structuring" is prohibited, or is it enough that the defendant knew of the institution's obligations and sought to "frustrate" or circumvent them?

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (Waldemar and Loretta Ratzlaf and the United States). Ron Hunt was a co-defendant in the district court, but he was acquitted and so was not a party to the appeal or in this Court.

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OPINIONS BELOW

The Ninth Circuit's opinion (per Poole, J., with Wallace, Ch.J., and Choy, J.) and the Court's accompanying judgment were filed October 6, 1992. The Opinion is published as *United States v. Ratzlaf*, 976 F.2d 1280 (1992); J.A. 51. There is no published opinion of the District Court. The Judgment of the district court (Hon. Edward C. Reed, Jr., Ch.U.S.D.J.), imposing sentence, was dated, as to petitioner Waldemar Ratzlaf, on July 11, 1991, and as to petitioner Loretta Ratzlaf, July 12, 1991. J.A. 31-48.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on October 6, 1992. On January 4, 1993, Justice O'Connor extended the time for filing a petition for writ of certiorari to and including January 19, 1993. The petition was filed on January 14, 1993. *See* S.Ct. Rules 13.1, 13.2 (1990 rev.). Certiorari was granted on April 26, 1993. This Court's jurisdiction rests upon 28 U.S.C. § 1254(1). J.A. 70.

STATUTES AND REGULATIONS INVOLVED

Due to their number and length, the Statutes and Regulations Involved (31 U.S.C. §§ 5313(a), 5321(a)(4),(a)(6) & (d), 5322(a) & (b), and 5324, 18 U.S.C. §§ 981(a)(1)(A), 982(a)(1) and 1956(a)-(d), and 31 C.F.R. §§ 103.11(e) & (p), 103.21, 103.22(a)(1) & (2), and 103.53) are reproduced in an Appendix to this Brief.

STATEMENT OF THE CASE

This case presents issues of statutory construction arising out of the prosecution and conviction of the petitioners, Waldemar and Loretta Ratzlaf, husband and wife, on charges of structuring currency transactions for the purpose of evading reporting requirements.

a. Procedural History

On November 20, 1990, a federal grand jury sitting in the District of Nevada indicted the petitioners and a third defendant, Ron Hunt. The indictment charges (1) conspiracy, in violation of 18 U.S.C. § 371, to structure and assist in structuring transactions in currency for the purpose of evading reporting requirements, prohibited by 31 U.S.C. §§ 5324(3)[1] and 5322(a) (Count One); (2) four counts of structuring currency transactions to evade reporting requirements, in violation of *id.* §§ 5324(3) and 5322(a) (Counts Two, Three, Four and Five); and (3) interstate travel in aid of racketeering (that is, from Nevada to a bank in California to engage in structuring activity similar to that charged in the other counts), in violation of 18 U.S.C. § 1952(a)(3) (Count Six). J.A. 2-15.

An 11-day jury trial was held in the United States District Court for the District of Nevada. On April 18, 1991, the court ordered dismissal of Counts Two and Three against Ron Hunt. On April 24, 1991, the jury convicted Mr. Ratzlaf on all counts and Mrs. Ratzlaf on the conspiracy and interstate travel charges, acquitting her on the others. The jury acquitted Mr. Hunt on all remaining counts. J.A. 1; *compare* J.A. 58 n.2 (misstating verdict as to Hunt).

Mr. Ratzlaf was sentenced to fifteen months' imprisonment on each count, to run concurrently; three years supervised release; and to pay a fine of $26,300 and special assessments totaling $300. J.A. 31-40. Mrs. Ratzlaf was sentenced to five years' probation on each count, to

---

[1] Recently, a new subsection was added to § 5324, resulting in the recodification of this provision as § 5324(a)(3). Annunzio-Wylie Anti-Money Laundering Act of Oct. 28, 1992, Pub.L. 102-550, tit. XV, § 1525(a), 106 Stat. 4064 (effective December 30, 1992). We refer to the anti-structuring provision in this brief by the designation it bore at the time of the offense, trial, and appeal.

run concurrently and to include ten months' home detention, and to pay a $7,900 fine and $100 in special assessments. J.A. 41-48.

At trial, the judge instructed the jury as follows on the structuring charges:

> The essential elements required to be proven beyond a reasonable doubt in order to establish the offenses charged in Counts Two through Five of the indictment, which are violations of Title 31, United States Code, Section 5324(3) and 5322(a) as defined in Title 31, Code of Federal Regulations, Sections 103.21 and 103.22(a)(1), are as follows:
>
> First, the defendants had knowledge of a financial institution's duty to report currency transactions in excess of ten thousand dollars.
>
> Second, with such knowledge, the defendants knowingly and willfully structured or assisted in structuring or attempted to structure or assist in structuring a currency transaction.
>
> Third, the purpose of the structured or attempted transaction was to evade the transaction reporting requirements; and,
>
> Fourth, the structured transactions involved one or more domestic financial institutions.
>
> An act is knowingly – let me start over. An act is done knowingly and willfully for the purposes of Title 31, United States Code, section 5324(3) and 5322(a), if the defendants, with knowledge of a financial institution's duty to report currency transactions in excess of ten thousand dollars, voluntarily or intentionally structured or assisted in structuring or attempted to structure or assist in the structuring [of] a currency transaction with the purpose of evading the currency reporting requirement.
>
> The government does not have to prove that the defendants knew the structuring was unlawful

nor does the government have to prove that the defendants knew of the existence of the law which they are charged with breaking, Title 31, United States Code, sections 5324(3) and 5322(a). However, if a defendant did not have knowledge of a bank's duty to report currency transactions in excess of ten thousand dollars, that may be considered a defense.

It is not a defense that the defendants did not know that structuring itself is a violation of law or of the existence of Title 31, United States Code, sections 5324(3) and 5322(a).

If you find that structuring occurred, and was knowingly and willfully engaged in by defendants for the specific purpose of evading a reporting requirement that was known by the defendants to exist, that is sufficient.

> Only a person who has deliberate intention to frustrate the reporting by the banks can be guilty of the offense of structuring.

J.A. 27-29. Defense counsel objected to this charge on the ground that the instruction did not require the government to prove that the defendants knew that structuring itself was illegal. J.A. 16-26.

On appeal, the Ninth Circuit affirmed. *United States v. Ratzlaf*, 976 F.2d 1280 (1992). The panel held that this Court's decision in *Cheek v. United States*, 498 U.S. 192 (1991), had not overruled the circuit's prior decision in *United States v. Hoyland*, 914 F.2d 1125 (9th Cir. 1990), and that the trial court's instructions to the jury on the elements of the offense had therefore been correct. J.A. 51-69.

On April 26, 1993, in light of the conflict between the Ninth Circuit's opinion and that of the unanimous, *in banc* First Circuit in *United States v. Aversa*, 984 F.2d 493

(1st Cir. 1993),[2] this Court granted the defendant Ratzlafs' petition for certiorari. J.A. 70. Petitioners remain at liberty on their recognizance pending appeal and review by this Court.

b. Statement of Facts

Petitioner Waldemar Ratzlaf owned a restaurant in Portland, Oregon, which generated substantial cash receipts. He also enjoyed legal gambling in Nevada. The events that led to this case began on October 20, 1988, at the High Sierra casino in Reno, Nevada. Mr. Ratzlaf lost $160,000 that evening playing blackjack. The casino, which had increased his credit line from $25,000 to $160,000 earlier that day, granted him one week to repay the loss.

On October 27, 1988, petitioners returned to the High Sierra casino with $100,000 in currency to pay off most of the gambling debt. Casino officials told Mr. Ratzlaf they could not accommodate his insistence that the casino not make any written report of the cash payment, and suggested that he obtain a single cashier's check for the amount due. The casino then made a limousine available to the petitioners and assigned employee Ron Hunt to assist them in obtaining a check locally.

On October 27, 1988, Hunt escorted the petitioners to five different banks in and near Stateline, Nevada, and South Lake Tahoe, California. First (as charged in Counts Two and Three) petitioners went to the First Interstate Bank in Stateline, Nevada. Each purchased from the same teller, with currency, a $9,500 cashier's check made payable to Resorts Reservations (an accommodation account

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[2] Actually, Chief Judge Breyer wrote a concurring opinion, 984 F.2d at 502-03, and Judge Torruella dissented, *id.* at 503-07, solely to emphasize that they would go further in granting relief than the First Circuit majority. However, they did not disagree with the majority on the issue presently before this Court.

with the casino). All that the teller who issued the cashier's checks could remember of the encounter was that she issued both of the checks, that they were purchased with cash, and that each of the Ratzlafs presented identification.

Next (as charged in Counts Four and Five), petitioners stopped at the Nevada Banking Company, also located in Stateline, Nevada. Petitioners and Hunt approached a teller's window. Mrs. Ratzlaf told the teller that she wished to purchase a cashier's check for cash in a specified amount over $10,000; the teller said that an IRS form would have to be filled out. Mrs. Ratzlaf stated that in light of that information she and Mr. Ratzlaf would like two cashier's checks for $9,500 each. The teller checked with her supervisor and told petitioners that for the two checks it would not be necessary to fill out the form. Each of the petitioners then purchased a $9,500 cashier's check from the same teller, made payable to Resort Reservations.

After visiting those two banks, petitioners crossed into California (as charged in Count Six) and stopped at several more banks, where they obtained more cashier's checks.[3] Petitioners then returned to the High Sierra casino and submitted these cashier's checks in partial payment of the gambling debt. However, not all of the $160,000 debt was eliminated. During the following month, Mr. Ratzlaf had three acquaintances acquire cashier's checks for him for $5,000, $5,000 and $7,500 in currency, respectively. Between November 29 and December 5, 1988, the Ratzlafs separately and together used currency to purchase five more cashier's checks, each in amounts less than $10,000, from two other Portland

[3] Only the transactions at First Interstate Bank and at Nevada Banking Company were the subject of the substantive structuring charges in the indictment in this case (Counts Two through Five). The District Court in Nevada lacked venue over the other transactions.

banks. Between October 26 and October 28, however, Mr. Ratzlaf openly engaged in five cash transactions of $20,000 each at different casinos, resulting in the proper filing of CTRs reflective of gambling income.

Mr. Ratzlaf testified at trial that the couple kept gambling winnings and cash revenues from their restaurant hidden in a piece of furniture in their bedroom. There was no evidence, however, that the money used to purchase the cashier's checks involved in this case was obtained illegally.

SUMMARY OF ARGUMENT

"Few areas of criminal law pose more difficulty than the proper definition of the *mens rea* required for any particular crime." *United States v. Bailey*, 444 U.S. 394, 403 (1980). Section 5324 of Title 31 prohibits any structuring of a currency transaction "for the purpose of evading" a reporting requirement. Section 5322 makes such conduct a felony if committed "willfully." For a variety of reasons, this "willfulness" element must be construed to require proof of an intentional violation of a known legal duty.

First, unless the term "willfully" is construed to mean "intending to violate a known legal obligation of the defendant," there is no difference between a mere regulatory violation of § 5324(3) and a "willful" violation punishable as a felony. Thus, the decision below violates the basic principle of statutory construction that every word in a statute be given effect. Moreover, in adopting the pre-existing § 5322 as the *mens rea* provision for criminal violations of the newly-created § 5324, Congress must be presumed to have accepted the well-settled judicial construction of the terms, such as "willfully," long contained in § 5322, absent evidence to the contrary. Prior to the enactment of § 5324, the "willfulness" requirement of § 5322 had always been construed to require the defendant's knowledge of the law regarding his or her own legal obligation as well as of the facts constituting the defendant's conduct. The same clause of the statute,

incorporated by reference in two different applications of the same enforcement scheme, ought to mean just one thing.

The crime of structuring currency transactions is not *malum in se* and does not involve highly regulated or highly dangerous activities. Only proof of an intentional violation of a known legal duty imparts to the crime of structuring any morally blameworthy aspect. Neither the clear language of the statute nor other techniques of statutory construction lead inexorably to the conclusion that Congress intended criminal liability for structuring to exist without knowledge of one's legal obligations. In addition, interpreting the statute to require proof of such knowledge avoids two constitutional questions that would otherwise arise.

Requiring the government to prove knowledge of the defendant's legal obligation, as a component of "willfulness," would not frustrate the congressional purpose behind the anti-structuring statute. Providing notice of the law at financial institutions would only discourage people from structuring transactions. Moreover, the law requires a "purpose of evading" the reporting requirements. The term "evading" is not synonymous with "avoiding" in conventional legal parlance, and should not be so construed.

Examination of the entire statutory scheme, including related statutes enacted at the same time, also leads to the conclusion that "willfully" means "with intent to violate a known legal duty." Only that construction places a criminal violation of the anti-structuring law above a civil violation in terms of seriousness, while ranking it below criminal money laundering. The legislative history does not support the application of a lower standard of intent, but rather shows that Congress concentrated on making the act of structuring an offense, while rejecting efforts to reduce the existing standard of *mens rea*.

Finally, even if prejudice would have to be shown, the error in instructing the jury in this case was both inherently and actually prejudicial.

ARGUMENT

A PERSON CANNOT "WILLFULLY VIOLATE" THE ANTI-STRUCTURING PROVISION OF THE BANK SECRECY ACT WITHOUT HAVING KNOWLEDGE THAT STRUCTURING FOR THE PURPOSE OF EVADING THE ACT'S CURRENCY TRANSACTION REPORTING REQUIREMENT IS PROHIBITED.

A provision of the Bank Secrecy Act of 1970 makes it a felony offense, punishable by up to five years in prison and a quarter million dollar fine, for a person "willfully" to violate "this subchapter," that is, Subchapter II of Chapter 53 of the Act, 31 U.S.C. §§ 5311 through 5326, "or a regulation prescribed under this subchapter." 31 U.S.C. § 5322(a).[4] Stat. App. 3. One statute in that subchapter, *id.* § 5324(3), added in 1986, Pub.L. 99-570, § 1354(a), 100 Stat. 3207-22,[5] states that no one may "structur[e] or assist

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[4] In addition, under 18 U.S.C. § 982(a)(1), a criminal forfeiture attaches to a conviction for this offense. If the offense is committed "as part of a pattern of any illegal activity involving more than $100,000 in a 12-month period" then the penalty is raised to a maximum of ten years' imprisonment and a $500,000 fine. 31 U.S.C. § 5322(b). Whether these additional elements of proof must be determined by the jury or constitute merely sentencing factors is a difficult issue of interpretation that is not presented in this case.

[5] The anti-structuring statute, 31 U.S.C. § 5324, became effective January 27, 1987, three months after enactment. Pub.L. 99-570, § 1364(a). The statute, known as the Anti-Drug Abuse Act of 1986, was signed into law on October 27, 1986. See *Gozlon-Peretz v. United States*, 498 U.S. 395 (1991).

in structuring, or attempt to structure or assist in structuring any transaction" with a bank (or other domestic financial institution) "for the purpose of evading the reporting requirements" of the Act. Stat. App. 4. The Act, in turn, merely requires compliance with regulations defining the duties of financial institutions. 31 U.S.C. § 5313(a). Stat. App. 1. One of these, contained in 31 C.F.R. § 103.22(a)(1), is a rule that the bank must file a Currency Transaction Report ("CTR") with the IRS concerning any cash transaction involving more than $10,000. Subsection 103.22(a)(1) of the regulations also contains the "aggregation rule," which provides that for purposes of the reporting requirement all transactions on behalf of a single principal occurring during a single business day at a single financial institution be treated as one. Stat. App. 14-15.

In this case, concerning the provision of 31 U.S.C. § 5322(a) that a violation of § 5324 constitutes a criminal offense only if the violator acts "willfully," the trial judge charged the jury, over defense objection, that the petitioners need only have had "knowledge of a financial institution's duty to report currency transactions in excess of ten thousand dollars" and then to have "voluntarily or intentionally structured or assisted in structuring or attempted to structure or assist in the structuring [of] a currency transaction with the purpose of evading the currency reporting requirement." The court specifically instructed the jury:

> The government does not have to prove that the defendants knew the structuring was unlawful nor does the government have to prove that the defendants knew of the existence of the law which they are charged with breaking. . . .
>
> • • • •
>
> Only a person who has deliberate intention to frustrate the reporting by the banks can be guilty of the offense of structuring.

J.A. 28, 29. Thus, the lower court instructed the jury that the only knowledge required to convict was the defendant's awareness of the bank's obligations, coupled with an intent to "evade" or "frustrate" the bank's duty to file a report. The decision below, affirming the convictions returned under these instructions, eliminates all meaning from the "willfulness" element of the offense, and erroneously substitutes an avoidance standard for the statute's requirement of intent to evade.

None of the key terms in this case – "structure," "transaction," "evading" or "willfully" – is defined in the statute. See *id.* § 5312 (definitions). The meaning of the plain language of section 5322 – "willfully violating this subchapter" – is not clear, standing alone. Literally, that phrase could mean either "deliberately doing what one knows to be in violation of this subchapter," or it could mean "deliberately doing the acts which happen to be prohibited by law under this subchapter." See *United States v. International Minerals & Chemical Corp.*, 402 U.S. 558, 561-63 (1971) (discussing meaning of "knowledge" in statute penalizing one who "knowingly violates any such regulation"). Congress has shown several times that it can, when it chooses, make the term "willfully" clearly modify actions, rather than violations of provisions.[6] That Congress chose "willfully violate" language for § 5322 might be taken to demonstrate its intent that one must be willful as to the fact that one is violating a section of the law, rather than that one be willful simply as to the act itself. A variety of approaches to resolution of the ambiguity all support that conclusion: to "willfully violate" in

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[6] See, *e.g.*, 47 U.S.C. § 501 ("any person who willfully and knowingly does . . . any act, matter, or thing, in this chapter prohibited or declared to be unlawful"); 15 U.S.C. § 1990(c) ("any person who knowingly and willfully commits any act . . . that violates any provision"); 40 U.S.C. § 1472(1)(2) ("whoever willfully . . . shall commit an act prohibited").

this statute means to commit a deliberate violation of a known legal duty.

The jury instructions in this case fell short of this standard. Accordingly, the judgment of the court below, and the petitioners' convictions, must be reversed.

A. Interpreting "Willfully" as Requiring Knowledge of One's Legal Obligations Is Necessary to Prevent the Element From Being Rendered Meaningless.

An intent to evade the reporting requirement of § 5313 is an element of the crime of structuring, found within the terms of § 5324(3) itself. In addition to that element is another: the willfulness requirement of § 5322. Unless "willfully" means "intending to violate a known legal obligation of the defendant" there is no difference between a mere regulatory violation of § 5324(3) itself and a "willful" violation that is punishable as a crime. Yet Congress clearly envisioned that there was a difference. As the First Circuit recognized, "there would have been no need for Congress to include the term 'willfully' at all if the government's reading of section 5322 were accurate." *Aversa, supra*, 984 F.2d at 497 n.6. Congress would simply have criminalized violations of § 5324(3) without more.

The decision below, following the leading case opposing *Aversa*'s analysis, *United States v. Scanio*, 900 F.2d 485 (2d Cir. 1990), does not respond to this argument. Indeed, the Ninth Circuit precedent followed by the court below implicitly concedes that its interpretation renders the term superfluous. "Congress changed the law to make it a crime so to structure with the intent to prevent reporting. To act willfully under the statute is to act with this intent." *Hoyland, supra*, 914 F.2d at 1129. See also *United States v. Pitner*, 979 F.2d 156, 161 n.5 (9th Cir. 1992) (referring to "the redundant language of 5322(b) and 5324(3)"). But as this Court held a century ago,

determining the meaning of "willfully violate" in a federal criminal statute:

> The word 'wilful' is omitted from the description of offences in the latter part of this section. Its presence in the first cannot be regarded as mere surplusage; it means something. It implies on the part of the [accused] knowledge and a purpose to do wrong. Something more is required than an act . . . without any purpose to evade or disobey the mandates of the law.

Potter v. United States, 155 U.S. 438, 446 (1894) (spelling as in original).

The structure of Chapter 53, Subchapter II, of the 1970 Act has been a significant factor for several courts interpreting provisions of the Subchapter where willfulness was not required, as for civil forfeiture under 31 U.S.C. § 5317 (funds not reported upon export or import). In accordance with the forfeiture statute's plain language, the majority of circuits have concluded that no knowledge of the reporting requirement is necessary to establish a civil forfeiture under § 5317(c), even though it is necessary for criminal conviction under sections 5316 and 5322. *United States v. $47,980 in Canadian Currency*, 804 F.2d 1085, 1090 (9th Cir. 1986); *United States v. $122,043 in U.S. Currency*, 792 F.2d 1470, 1474 (9th Cir. 1986). "Congress could have used identical language in both the civil forfeiture and criminal provisions. The fact that it chose not to do so must be given heed." *United States v. $359,500 in U.S. Currency*, 828 F.2d 930, 933 (2d Cir. 1987).

The same analysis applies to structuring. When Congress enacted § 5324(3), it also created 18 U.S.C. § 981(a), allowing forfeiture of structured funds upon proof of any violation of § 5324. This section stands in contrast to § 5322, which criminalizes only "willful" violations of § 5324(3), and even to § 5321, which permits the imposition of a civil penalty only upon proof of a "willful" violation. Since non-willful violations require an intent to

evade reporting requirements under the language of § 5324 itself,[7] willful violations necessarily require more.

As this Court recently ruled in the context of civil enforcement of the Fair Labor Standards Act, "The fact that Congress . . . adopted a two-tiered statute . . . makes it obvious that Congress intended to draw a significant distinction between ordinary violations and willful violations." *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 132 (1988). This Court rejected as necessarily wrong a "standard of willfulness [that] virtually obliterates any distinction between willful and nonwillful violations." *Id.* The *Scanio* type of analysis is actually less plausible than that condemned in *McLaughlin*, because it totally, rather than "virtually," obliterates the distinction between willful and nonwillful violations of § 5324(3). Because it fails this basic test of statutory construction – the requirement that every word be given effect, if possible[8] – the decision below must be reversed.

B. In Selecting the Willfulness Element Already Contained in 31 U.S.C. § 5322 to Apply to the Newly-Created Structuring Offense in § 5324, Congress Must Be Deemed to Have Adopted Its Settled Construction as Requiring a Knowing Violation by the Defendant of His Legal Obligations.

Prior to the 1986 enactment of § 5324, the "willfulness" requirement of § 5322(a) and (b) consistently had

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[7] See *United States v. Dollar Bank Money Market Account*, 980 F.2d 233 (3d Cir. 1992) (§ 5324's requirement of "intent to evade" a reporting requirement demands proof that alleged violator knew CTR filing was required by law and not merely by bank policy).

[8] See *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) ("In construing a statute we are obliged to give effect, if possible, to every word Congress used.").

been construed to require knowledge of the law regarding the defendant's own legal obligation as well as of the facts constituting the defendant's conduct. In prosecutions under § 5322 of financial institutions for directly violating 31 U.S.C. § 5313(a), it was settled by 1986 that the government had to prove "that the defendant acted with knowledge of the requirements of the law and willfully failed to obey it." John K. Villa, Banking Crimes § 6.05[1][b][iii], at 6-60 (Dec. 1992 rev.); see *United States v. Eisenstein*, 731 F.2d 1540, 1543 (11th Cir. 1984).

Likewise, the circuits consistently had demanded proof of knowledge that one's conduct was prohibited in cases of failure to declare possession of more than $5000 (later raised to $10,000) in currency while crossing an international border. See *id.* § 6.05[1][a][iii], at 6-53 & n.12 (collecting cases under 31 U.S.C. § 5316; *e.g.*, *United States v. Dichne*, 612 F.2d 632, 636 (2d Cir. 1979); *United States v. Granda*, 565 F.2d 922, 926 (5th Cir. 1978) (willfulness requires knowledge of the reporting requirement).[9] See also *United States v. Sturman*, 951 F.2d 1466 (6th Cir. 1991) (failure to maintain records and file reports of foreign monetary transactions under *id.* § 5314, punishable under § 5322; "willfulness" requires knowledge of one's legal obligation). In adopting this provision as the *mens rea* for criminal violations of the newly-created § 5324, Congress must be presumed to have adopted the well-settled judicial construction of the terms, such as "willfully," long contained in § 5322.

The First Circuit's *in banc* decision in *Aversa* properly relies heavily on this point:

> Ascribing various meanings to a single iteration of a single word – reading the word differently for each code section to which it applies – would open Pandora's jar. If courts can render meaning

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[9] For discussion of the elements of the § 5316 offense, see generally *United States v. Woodward*, 469 U.S. 105 (1985) (per curiam).

so malleable, the usefulness of a single penalty provision for a group of related code sections will be eviscerated and, by extension, almost any code section that references a group of other code sections would become susceptible to individuated interpretation.

Furthermore, if Congress wanted the purposive mens rea in the antistructuring statute to stand alone, it had several simple options. It could, for example, have placed the antistructuring provision somewhere other than in Subchapter II, or amended the criminal sanctions provision to except structuring violations.[7] It exercised none of the available options. Thus, absent powerful evidence to the contrary, we believe courts should presume that Congress intended the mens rea set by section 5322 to apply in equal measure to both CTR violations and structuring offenses.

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[7] In fact, Congress chose precisely this course for the provision requiring reports on foreign currency transactions, 31 U.S.C. § 5315, leaving only civil penalties available for enforcement of that provision. See 31 U.S.C. § 5322(a)-(b).

984 F.2d at 498-99 & n.7.[10] Neither the court below nor any of the other cases in the circuits which follow *United*

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[10] In *United States v. Bank of New England*, 821 F.2d 844, 854 (1st Cir.), *cert. denied*, 484 U.S. 943 (1987), subsequent to the enactment of § 5324, the First Circuit had held in a prosecution for violating § 5313 that "willfulness" could be proved by showing either knowledge of the law or a reckless disregard of its provisions.

States v. Scanio, supra, 900 F.2d 485, the leading case contrary to *Aversa*, explain how "willfully" can mean two different things in one occurrence. The closest any of the cases comes to even discussing this point is *Scanio* itself. But all the Second Circuit does is acknowledge the differing meanings and state a policy reason why Congress *might* wish to impose different mental elements for the two crimes. 900 F.2d at 484-85. Nothing in the language of § 5322 shows that Congress did *in fact* impose different elements. Nor does *Scanio* address the point made in *Aversa* – that although Congress might want to impose different elements for violations of different provisions, the structure of the Subchapter shows that it did not do so.

Curiously, the court below spoke of "the distinction between 'willful' as used in section 5324(3) and as employed in 31 U.S.C. § 5316. . . . " *Ratzlaf, supra*, 976 F.2d at 1284 n.4; J.A. 61. But "willfully" does not appear separately in each of those sections, such that it arguably might have a different meaning in each. It appears only once, in § 5322, where it must have just one meaning. As this Court recently has noted, "Our normal canons of construction caution us to read the statute as a whole, and, unless there is a good reason, to adopt a consistent interpretation of a term used in more than one place within a statute." *United States v. Thompson/Center Arms Co.*, 504 U.S. ___, 112 S.Ct. 2102, 119 L.Ed.2d 308, 316 n.5 (June 8, 1992) (plurality). *A fortiori*, the same clause of the statute, incorporated by reference in two different applications of the same enforcement scheme, ought to mean

just one thing. See *United States v. Murdock*, 290 U.S. 389, 395 (1933) ("the other omissions which the statute denounces in the same sentence only if willful, aid in ascertaining the meaning [of that term] as respects the offense here charged").

In the absence of evidence to the contrary, the inference is compelling that the meaning of "willfully" in § 5322(a) and (b) does not change when attached to a structuring violation under § 5324 from that which it has when applied to a violation of sections 5313, 5314 or 5316. In those cases, it means "intentionally violating a known legal duty." The same is the correct construction here, in the context of section 5324.

C. An Interpretation of "Willfully" as Requiring Knowledge of One's Legal Obligations Is Necessary for the Defendant's Conduct to Be Properly Treated as Morally Wrongful.

It goes without saying that if an offense is *malum in se*, a punishable intent to do wrong inheres in the defendant's voluntarily engaging in the conduct, knowing the nature of the act. The crime of structuring currency transactions, however, is plainly not of that nature. There is deeply embedded in our legal tradition the idea that criminality without consciousness of wrongdoing is a rare exception, and not to be deemed to be the will of Congress unless either clear language or other techniques of statutory construction lead inexorably to that conclusion. *United States v. United States Gypsum Co.*, 438 U.S. 422, 436-38 (1978). See generally *United States v. Bailey*, 444 U.S. 394, 403-06 (1980). Application of that principle also supports a reversal of the Ninth Circuit's decision below.

1. Intent to violate a known legal duty is a common mental element for *malum prohibitum* felonies not involving highly regulated or inherently dangerous activities.

This Court and others have ruled repeatedly that when Congress imposes a *scienter* element for crimes in the nature of *malum prohibitum*, knowledge of the nature of the prohibition is required unless the case falls into one of two exceptional categories. First, knowledge of the facts alone may be enough if the activity is inherently dangerous, so that it can properly be thought that Congress intended to impose a high level of self-restraint by making participants act at their peril. See *United States v. Freed*, 401 U.S. 601 (1971) (possession of unregistered hand grenade); *United States v. Balint*, 258 U.S. 250 (1922) (sale of narcotics without required order form). The anti-structuring law is not of that kind. *See* Sarah N. Welling, *Smurfs, Money Laundering, and the Federal Criminal Law: The Crime of Structuring Transactions*, 41 Fla.L.Rev. 287, 313 (1989).

The second exception exists where the offense is applicable only to a class of persons who are knowingly engaged in a highly regulated business (whether or not dangerous). See *International Minerals & Chemical Corp., supra; Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337 (1952) (knowledge of the facts all that is required for environmental safety infractions); see also *United States v. Park*, 421 U.S. 658 (1975); *United States v. Dotterweich*, 320 U.S. 277 (1943) (strict liability for Pure Food and Drug violations upheld, subject to impossibility defense). Being a bank customer (as opposed to being a banker or a bank) does not put one into such a class of persons.

In *malum prohibitum* cases not falling into either of these exceptional categories, however, including but not limited to criminal tax cases, the federal courts have consistently resolved any ambiguities in Congress's specification of the *mens rea* in favor of the highest level of

scienter – intentional violation of a known legal duty.[11] The reason is clear: without that knowledge, there is no blameworthy consciousness of wrongdoing. This standard was authoritatively established for tax cases in *United States v. Pomponio*, 429 U.S. 10, 12 (1976) (per curiam). In *Cheek v. United States*, 498 U.S. 192 (1991), this Court applied that ruling to reverse a conviction arising out of a prosecution for tax evasion and failure to file a return, where the defendant claimed he did not know that his wages were taxable as "income" under the Internal Revenue Code and the jury instructions had required any such belief to be found "reasonable" before it could establish a defense.

Several courts have contended that *Cheek* supports the result reached in this case below, because of this Court's observation that, in general, "ignorance of the law or a mistake of law is no defense to criminal prosecution. . . . " 498 U.S. at 199. But *Cheek* itself involved "an exception to the traditional rule," *id.* at 200, and that exception is not *sui generis*. See *United States v. Freed*, 401 U.S. 601, 615 n.6 (1971) (Brennan, J., concurring); 1 ALI, Model Penal Code and Commentaries, pt. I, § 2.02, at 250-51 (1985); Wayne R. LaFave & Austin W. Scott, Substantive Criminal Law § 5.1(d), at 585 (1986) (discussing when knowledge of law is required).

Certainly this Court in *Cheek* did not mean to hold that knowledge of a legal provision is never an element of

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[11] There was, until 1976, an arguably higher level of willfulness required in many criminal cases – the "bad purpose" or "evil motive" test adopted in *Murdock*, *supra*, and earlier cases cited there. *See* Note (S. Brogan, student author), *An Analysis of the Term "Willful" in Federal Criminal Statutes*, 51 Notre Dame Law. 786, 788-91 (1976). In *United States v. Pomponio*, 429 U.S. 10, 12 (1976) (per curiam), explaining and rejecting some ambiguity and dictum in *United States v. Bishop*, 412 U.S. 346 (1973), this Court unanimously for all practical purposes appears to have abandoned permanently all uses of that test.

a crime outside the tax code. The wide variety of statutes in which courts have found such an element to exist – either by construing a "willfulness" element or even, sometimes, a "knowledge" requirement – belies the lower courts' attempt to read *Cheek* in that manner.[12] In *Liparota v. United States*, 471 U.S. 419 (1985), this Court held that a statute making it an offense knowingly to acquire food stamps in a manner unauthorized by law made knowledge of whether one's manner of acquisition was authorized a required element of proof. As the Court said, "This construction is particularly appropriate where, as here, to interpret the statute otherwise would be to criminalize a broad range of apparently innocent conduct." *Id.* at 426. The same test of willfulness applies to other *malum prohibitum* offenses where felony penalties apply, whether or not the proscribed conduct is facially "innocent."

Examples can be multiplied. *See* 22 U.S.C. § 2778(c) (exportation of armaments; "any person who willfully violates any provision of this section"); see *United States v. Golitschek*, 808 F.2d 915 (2d Cir. 1986); *United States v. Lizarraga-Lizarraga*, 541 F.2d 826, 828 (9th Cir. 1976) (willfulness requires proof of defendant's "specific intent to do or fail to do what he knows is unlawful"); *United States v. Adames*, 878 F.2d 1374, 1377 (11th Cir. 1989); *United States v. Davis*, 583 F.2d 190, 193 (5th Cir. 1978); 50

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[12] Although the claim also has been made in a number of recent cases, including by the court below, that the "violation of a known legal duty" definition of willfulness is somehow "unique" to "complex" tax cases, this view is simply unsupportable. A wide variety of non-tax *malum prohibitum* crimes involving an intent to violate the requirements of a different body of law employ the same definition. In any event, it is ludicrous to suggest that the particular law involved here is any less "complex" than the specific law involved in *Cheek*, which merely requires that a tax return be filed when a person earns more than a certain amount of gross income, or that the whole body of currency transaction laws is not as difficult to understand and obey as the tax code.

U.S.C. Appx. § 5 (Trading with the Enemy Act) ("whoever shall willfully violate any of the provision of this Act . . . "); *United States v. Frade*, 709 F.2d 1387, 1392 (11th Cir. 1983) (willfulness requires awareness that activities are regulated); *United States v. Tooker*, 957 F.2d 1209 (5th Cir. 1992); 50 U.S.C. Appx. § 462(a) (criminal penalties provision of Military Selective Service Act); *United States v. Kerley*, 838 F.2d 932, 936, 942 (7th Cir. 1988) (Posner, J.); *United States v. Schmucker*, 815 F.2d 413, 421 (6th Cir. 1987) ("The term 'willfully' . . . require[s] proof of . . . an intentional violation of a known legal duty."); *United States v. Rabb*, 394 F.2d 230, 231-32 (3d Cir. 1968) (same).

Further examples abound. *See* 45 U.S.C. § 152 (Railway Labor Act; "the willful failure or refusal . . . to comply with the terms of . . . this section"); *United States v. Winston*, 558 F.2d 105, 108 (2d Cir. 1977) (conduct must constitute a "voluntary, intentional violation of a known legal duty"); 49 U.S.C. § 1472(a) (federal aviation regulations; "any person who knowingly and willfully violates any provision of this chapter"); *United States v. Eastern Airlines*, 192 F.Supp. 187, 192 (S.D.Fla. 1961) (requiring "conscious and deliberate intent to disobey"). The *Pomponio* definition of willfulness also applies, in effect, to criminal civil rights cases, as construed in *Screws v. United States*, 325 U.S. 91 (1945) (plurality), where a specific intent to violate an established constitutional right must be proved. See also *United States v. North*, 910 F.2d 843, 884-88 (D.C. Cir. 1990) (per curiam) (relationship of authorization defense to proof of 18 U.S.C. § 2071(b) violation, requiring proof of subjective knowledge of illegality), *reaff'd on denial of reh'g*, 920 F.2d 940, 949-50, *cert. denied*, 111 S.Ct. 2235 (1991); *but see* 920 F.2d at 959-60 (R.B. Ginsburg, J., dissenting from denial of rehearing in banc).

The *Scanio* cases, such as the decision below, almost all rely on Judge Learned Hand's observation in *American Surety Co. v. Sullivan*, 7 F.2d 605, 606 (2d Cir. 1925), that in general the term "willfully," "even in criminal statutes, means no more than that the person charged with the

duty knows what he is doing." J.A. 67 n.8. But *American Surety's* claim that "willfully" generally means no more than "knowingly" was not true then[13] and is not true now outside the realm of *malum in se* offenses.[14]

In *Hazen Paper Co. v. Biggins*, 507 U.S. ___, 123 L.Ed.2d 338, 349-51 (April 20, 1993), this Court reaffirmed

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[13] This Court stated in *United States v. Murdock*, 290 U.S. 389 (1933):

> The word ['willful'] often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But, when used in a criminal statute, it generally means an act done with bad purpose, without justifiable excuse, stubbornly, obstinately, perversely. The word is also employed to characterize a thing done without ground for believing it is lawful, or conduct marked by careless disregard whether or not one has the right so to act.

Id. at 394-95 (citations omitted). See *Trans World Air Lines, Inc. v. Thurston*, 469 U.S. 111, 126-27 (1985) (discussing conventional view of "willfulness" in 1930's, citing *Murdock* as example). *Murdock* was a criminal tax case, but this Court's observation there about the meaning of "willful" in criminal statutes was not limited to tax cases. See, *e.g.*, *Spurr v. United States*, 174 U.S. 728, 734-35 (1899); *Potter v. United States*, 155 U.S. 438, 446 (1894); *cf. Felton v. United States*, 96 U.S. 699, 702 (1878) (civil penalty statute). The definition this Court pronounced in *Murdock* carries at least as much weight as the *obiter* generalization in *American Surety*, which was not a criminal case at all, but a civil suit for damages.

[14] *American Surety* was written by a jurist with an expressed hostility to use of the term "willfully." Judge Hand described it 30 years later as a "very dreadful word," an "awful word," which would "lead all the rest" in being purged from the index if he could. *Hoyland*, 914 F.2d at 1129; *Aversa*, 984 F.2d at 497 n.5, *both quoting* 1 ALI, Model Penal Code and Commentaries, pt. I, § 2.02, at 249 n.47 (1985) (setting out a 1955 exchange between Judge Hand and Professor Wechsler); *see also* Wayne R. LaFave & Austin W. Scott, Substantive Criminal Law § 3.4(d), at 299 (1986) (noting ambiguity of term "willfully").

its adoption for purposes of certain civil penalty statutes of a definition of "willfulness" that covers both actual knowledge of the pertinent prohibition and also "reckless disregard for the matter of whether [one's] conduct was prohibited." *Id.* at 349. The Court described that standard as "consistent with the meaning of 'willful' in other criminal and civil statutes." *Id.* The *in banc* First Circuit had adopted this test in *Aversa, supra,* construing "willfully" under 31 U.S.C. § 5322 as applied to structuring violations prosecuted under § 5324, and announced that it would apply the same standard to all applications of § 5322. 984 F.2d at 498-500.

While the petitioners would be entitled to reversal were this Court to adopt that standard, and we do not disavow it, we suggest that it is not as supportable as the *Pomponio/Cheek* test. There is no evidence or reason to believe that Congress intended, either in 1970 or in 1986, to adopt that standard as the meaning of "willfully" for criminal cases under § 5322.[15] Contrary to the implication of this Court's dictum, there are very few kinds of

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[15] The First Circuit suggested that a "recklessness" alternative had to be included with its "willfulness" standard in order to preserve a "willful blindness" rule, but that concern is not well founded. "Willful blindness" is a rule of law that allows a jury to accept as proof of "knowledge" evidence of a "conscious purpose to avoid learning the truth" coupled with awareness of "a high probability of that truth." *United States v. Caminos,* 770 F.2d 361, 365 (3d Cir. 1985); accord, *United States v. One 1989 Jeep Wagoneer,* 976 F.2d 1172 (8th Cir. 1992). See *Spurr v. United States,* 174 U.S. 728, 735 (1899); *United States v. Jewell,* 532 F.2d 697 (9th Cir.) (in banc), *cert. denied,* 426 U.S. 951 (1976). Under these cases, any test that requires "knowledge," including that sought by the petitioners, will allow proof of "willful blindness" to substitute. A separate, diluted "recklessness" standard – which eliminates the requirement of showing a conscious purpose to avoid learning the truth – is not needed for this purpose.

criminal cases, mainly in labor law enforcement,[16] to which it has been applied in recent years.[17]

To adopt the First Circuit's test in this context would only further confuse the law of *mens rea* by importing into criminal law what has basically become a civil standard. John K. Villa, *A Critical View of Bank Secrecy Act Enforcement and the Money Laundering Statutes,* 37 Cath.U.L.Rev. 489, 499 n.75 (1988). Where, as here, "willfulness" means more than acting with knowledge of the facts making the conduct wrongful, "intentional violation of a known legal duty" is the criminal standard.

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[16] *See* 29 U.S.C. § 439 (labor-management reporting and disclosure; "any person who willfully violates this subchapter"); *United States v. Otley,* 509 F.2d 667, 672 (2d Cir. 1975) (willfulness requires knowledge of law or action "in reckless disregard of the law's requirement"); 29 U.S.C. § 216(a) (fair labor standards; "any person who willfully violates any of the provisions"); *Nabob Oil Co. v. United States,* 190 F.2d 478, 479-80 (10th Cir.), *cert. denied,* 342 U.S. 876 (1951) (defendant not guilty "unless he is either conscious of the fact that what he is doing constitutes a violation of the Act or unless he wholly disregards the law and pursues a course without making any reasonable effort to determine whether the plan he is following would constitute a violation of the law"); 29 U.S.C. § 666(e) (Occupational Safety and Health Act) ("Any employer who willfully violates any standard"); *United States v. Dye Construction Co.,* 510 F.2d 78, 82 (10th Cir. 1978) (defendant must intentionally disregard the standard or be plainly indifferent to its requirement).

[17] In the case on which *Hazen Paper* relied, *Trans World Air Lines, Inc. v. Thurston,* 469 U.S. 111, 126 (1985), this Court pointed to *Murdock, supra,* as an example of the application of this test in a criminal case. The Court's citation of *Murdock* in this regard is puzzling, as *Murdock* was plainly overruled (or at least explained away) in *Pomponio, supra,* and *Cheek, supra,* and replaced with a pure "knowledge of the law" standard.

2. The intentional violation of a known legal duty is the only morally blameworthy aspect of structuring, and interpreting the statute to require such proof avoids two constitutional questions that would otherwise arise.

As defined by the Treasury Department's regulations, and as generally applied by the courts of appeals, to "structure" one's transactions to "evade" the reporting requirements imposed on financial institutions by 31 C.F.R. § 103.22(a)(1) means no more than to arrange one's dealings with the institution so as to *avoid* those requirements. See *id.* § 103.11(p).[18] If this standard is correct, then the only morally culpable conduct involved in the § 5324 offense lies in the "willfulness" element. As Justice Souter recently has emphasized:

> We do not accept the Government's suggestion . . . that [a revenue statute should be broadly construed] because otherwise manufacturers will be able to 'avoid the tax' . . . [If the tax at issue applies to disassembled as well as assembled firearms, f]ailure to pay the tax on such a kit would amount to evasion, not avoidance. In our system, avoidance of a tax by remaining outside the ambit of the law that imposes it is every person's right.

United States v. Thompson/Center Arms Co., 504 U.S. ___, 112 S.Ct. 2102, 119 L.Ed.2d 308, 315 n.4 (June 8, 1992)

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[18] This is apparent from the structuring regulation's explicit coverage of transactions "at one *or more* financial institutions" and "on one *or more* days" and involving amounts "*at or below* $10,000," where the reporting regulation itself, *id.* § 103.22(a)(1), is limited to transactions exceeding $10,000 at one institution on the same business day. In short, simply by arranging for a transaction to be at or below the $10,000 nonreportable limit one can, under this regulation, run afoul of the "structuring to evade" prohibition.

(plurality opinion).[19] In short, avoidance of the application of governmental regulations is not inherently blameworthy. Under the Treasury's construction of the anti-structuring law, culpability enters the picture only through the "willfulness" element.

In § 5324(3), Congress has prohibited acting with the intent to "evade" the reporting requirements. If by that language it meant to prohibit avoidance as well, then "avoidance of [the reporting requirements] by remaining outside the ambit of the law that imposes [them] is [no one's] right." In part D.2. of this Brief, petitioners suggest that the prevailing (and official regulatory) construction of the "purpose of evading" element must be wrong. The point here, however (regardless of the contention advanced below), is that it is embedded in our legal culture – particularly as regards financial and tax-related regulations – that if one can arrange one's affairs so as not to implicate a rule that one wishes to avoid, then one has done no moral wrong.

In *United States v. Caldwell*, 989 F.2d 1056 (9th Cir. 1993), the court recently reversed a conviction for conspiring to defraud the United States. The government had argued that "people have a duty 'not to conduct their business affairs in such a manner that the IRS would be impeded and impaired in its . . . collection of revenue.'" *Id.* at 1059. The court rejected that position and reversed the convictions. Judge Kozinski's eloquent opinion states:

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[19] As Justice Holmes wrote for a majority of this Court (apparently using the term "evade" to mean "avoid"): "The fact that [the petitioner oil company] desired to evade the law, as it is called, is immaterial [to the question whether its transactions were subject to a state tax], because the very meaning of a line in the law is that you intentionally may go as close to it as you can, if you do not pass it." *Superior Oil Co. v. Mississippi ex rel. Knox*, 280 U.S. 390, 395-96 (1930).

> There are places where, until recently, 'everything which [was] not permitted [was] forbidden. . . . ' Fortunately, the United States is not such a place, and we plan to keep it that way. If the government wants to forbid certain conduct, it may forbid it. . . . But we won't lightly infer that . . . Congress meant to forbid all things that obstruct the government. . . . So long as they don't act dishonestly or deceitfully, and so long as they don't violate some specific law, people living in our society are still free to conduct their affairs any which way they please.

Id. at 1061; *accord, United States v. Mastronardo*, 849 F.2d 799, 805 (3d Cir. 1988) ("frustrating the intent of Congress is not criminal").

Of course, there is now a "specific law" requiring people not to conduct their transactions in a manner to defeat the IRS's collection of information about cash deposits. But as *Caldwell* makes clear, the presumption in this country is that individuals and businesses may use the form of their transactions to avoid particular regulatory requirements. Given that presumption, it indeed poses a trap for the unwary to punish attempted circumvention of a regulation, absent proof of knowledge that circumvention is prohibited. Thus, if the "purpose of evading," as used in this statute, connotes no more than avoidance, it imputes no morally culpable conduct, and the punishment-worthy *scienter* must lie in the element of "willfulness."

The reporting requirement imposed on financial institutions is simply to obey the Treasury regulations promulgated under that section. 31 U.S.C. § 5313(a). Stat. App. 1. The key regulation, in turn, 31 C.F.R. § 103.22(a)(1), requires a bank to report (that is, to prepare and file a "CTR" about) any transaction in currency exceeding $10,000. The regulation further requires the bank to aggregate (and thus treat as a single transaction) all transactions of which it has knowledge "by or on

behalf of" the same person, occurring at any branch of the institution on a single business day. Stat. App. 14-15. Thus, a financial institution commits no violation of its reporting obligation under the Bank Secrecy Act by filing no CTR if it lacks knowledge, or if a customer who engages in a transaction involving less than $10,000 in currency also engages in such a transaction at another institution, or on another day, that would bring the total currency involved to more than $10,000.[20]

When customers, knowing (or thinking they know) the limitations of § 103.22(a)(1), arrange their banking so that no obligation to report arises, they would not ordinarily, in the context of American legal culture, be thought of as doing anything wrong.[21] In a free country, it cannot be considered morally suspect to wish to keep personal information out of government files. Nor is a concern for financial privacy the only legitimate reason deliberately to keep one's cash deposits lower than

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[20] The bank may, however, have a duty imposed by its governing regulatory agency, the Federal Reserve or FDIC, to file a report of some other kind. *See* BSA Treasury Ruling 88-1 (June 22, 1988), *reprinted as* Appendix to 31 C.F.R., part 103; 12 C.F.R., part 353 & Appendix A; *cf. id.* § 208.14 (FDIC requirement for BSA compliance program); *id.* § 326.8 (equivalent Federal Reserve regulation).

[21] This is certainly so, at least, where the customer's arrangements seek to avoid implicating the "one day" or "one bank/all branches" components of the aggregation rule. It is a closer case where the customer seeks to avoid the bank's obligation to report by attempting to see that the bank does not "ha[ve] knowledge" of the facts that would require it under the regulation to aggregate. None of the "structuring" counts in this case are of that kind, however. At both of the banks involved in Counts Two, Three, Four and Five, for all the evidence shows, the petitioners went together to the same teller's window and asked her, quite openly, to issue two cashier's checks, each for less than $10,000, to be purchased from a single pile of currency. Nothing was hidden from either bank.

$10,000. A person might reasonably be concerned about the possibility of a crime committed against the messenger taking the money to the bank, either in terms of physical safety or of amount of loss risked. An innocent person might also be concerned about others' unfounded suspicions of one's being in an illicit business arising from the handling of so much cash at one time, not to mention the reasonable desire to avoid the inconvenience of an IRS investigation and audit, no matter how baseless.

Contrary to *Scanio, supra*, and the case law which follows it, such as the decision below, knowledge of the reporting duty imposed by 31 U.S.C. § 5313, as required by the jury instructions given at trial and as held sufficient by the majority of circuits, is not morally equivalent to the "known legal duty" standard, because § 5313 imposes no duty on the bank customer.[22] Unless the term "willfully" in § 5322(a) and (b) is construed to impose an element of knowledge that the *customer's conduct* is improper, *the customer* is indeed punished for "apparently innocent conduct." *Liparota, supra*.

There are many analogies. Some of the most common examples exist in the tax arena, where the machinations undertaken to avoid taxes can reach incredible levels of complication. (Or they may be as simple as taking out a home equity loan to pay off other debts, knowing that the interest on loans secured by one's residence is deductible, while interest on other personal loans is not.) In tax law,

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[22] In *United States v. Brown*, 954 F.2d 1563, 1568 n.1 (11th Cir.), *cert. denied*, 113 S.Ct. 284 (1992), the court said that its interpretation of "willful" as applied to § 5324(3) was "not inconsistent" with the cases involving § 5313, because both required knowledge of the reporting obligation. The argument is sophistry. The pre-§ 5324 cases involving the reporting requirement did not hold that "willful" meant "with knowledge of the reporting requirement." Rather they held that "willful" meant "with knowledge of one's legal obligations," which in § 5313 happens to involve a reporting requirement.

the distinction between "evading" a tax – illegally failing to pay it with the aid of some fraudulent contrivance – and "avoiding" the tax – structuring one's transactions so that the tax will not be due – is universally recognized. *See* 1 Boris I. Bittker & Lawrence Lokken, Federal Taxation of Income, Estates and Gifts ¶4.3.2, at 4-28 to -33 (2d ed. 1989). Some of the *Scanio* cases suggest that the distinction exists, however, only in the tax laws.

That is simply incorrect. The classic example is incorporation, whereby a sole proprietor, through the simple expedient of forming a corporation, can avoid millions of dollars in potential liability. The difference can be one of form only, maintained through minimal effort and expense. Many businesses "structure" securities offerings as purely intrastate to avoid SEC registration. Likewise, there is no Medicaid fraud in an elderly couple's using their savings to purchase a condominium when they have rented all their lives, knowing that the value of a home will not count for purposes of determining financial eligibility for nursing home reimbursements.[23] In short, many citizens, whether ordinary folks or sophisticated business people, see nothing "non-innocent" about organizing their activities to get around some particular regulation which they find inconvenient or offensive.

Despite these common analogies, numerous judges have reacted the opposite way in currency structuring cases. The reason must be that the lower courts have felt that many, or even most, people who are structuring are involved with other criminal conduct. But that difference, even were it true, could not support a different result.

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[23] As another example, spouses in community property states can circumvent the dollar limit on FDIC insurance, simply by setting up three $100,000 bank accounts with different combinations of their names, rather than one $300,000 account in both their names. Nor is there bankruptcy fraud in a debtor's selling non-exempt assets prior to filing and using the money to purchase exempt assets.

Since an ulterior criminal purpose is certainly not always present, the risk is incarcerating people whose only fault was wishing to take lawful advantage of a regulation's "loopholes." Indeed, "willfully" appears and certainly means the same in § 5322(a) as in § 5322(b), which carries twice the maximum penalty. The latter section applies whenever the structuring activity occurs, *inter alia*, "while violating another law of the United States." Stat. App. 3. Structurers with an ulterior illegal purpose are covered and severely punished in the aggravated subsection. That consideration cannot affect the construction of the term "willfully," which is common to both subsections.

The other proposition about structuring's "non-innocence," set forth somewhat more explicitly in the *Scanio* line of cases, is likewise faulty. According to these cases, an attempt to change the form of a transaction, for purposes of denying the government information, is not "non-innocent behavior," so that a *Pomponio/Cheek* level of intent would not be required. But this theory, as well, cannot be reconciled with the cases or with experience. Failure to register with Selective Service deprives the government of information, as does failure to file a tax return, failure to report the international transportation of monetary instruments, and failure to obtain an arms export license. Yet each of these offenses requires proof that the defendant knew of his or her legal obligation.

Moreover, there is the problem of simple fairness. "The criminal sanction would be used, not to punish conscious and calculated wrongdoing at odds with statutory proscriptions, but instead simply to regulate business practices regardless of the intent with which they were taken." *United States v. United States Gypsum Co.*, 438 U.S. 422, 442 (1978); *accord*, *Aversa*, *supra*, 984 F.2d at 502 (Breyer, J., concurring: discussing "the unfair result of criminally prosecuting individuals who subjectively and honestly believe they have not acted criminally").

Finally, by construing the "willfulness" requirement to require an intent to violate a known legal duty, the

Court can avoid the necessity of deciding two difficult and recurrent constitutional questions. See *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust*, 113 S.Ct. 2264, 2282-84 (June 14, 1993) (compiling cases on avoidance of unnecessary constitutional issues); *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 294 (1982). First is the question (pretermitted more than once before[24]) whether the Due Process Clause requires that a serious crime involve *scienter*, that is, an element of morally wrongful conduct, intentionally and knowingly performed. *See generally* Richard Singer, *The Resurgence of Mens Rea: III – The Rise and Fall of Strict Criminal Liability*, 30 B.C.L.Rev. 337, 398-403 (1989); C. Peter Erlinder, *Mens Rea, Due Process, and the Supreme Court: Toward a Constitutional Doctrine of Substantive Criminal Law*, 9 Am.J.Crim.L. 163 (1981); Herbert Packer, *Mens Rea and the Supreme Court*, 1962 S.Ct.Rev. 107 (advancing the constitutional argument).

The Court can also avoid a second constitutional issue. In light of the extraordinary breadth of the regulatory definition of "structuring" under this statute, Stat. App. 13-14, if "purpose of evading" is construed to mean "purpose of avoiding" and "willfully" is construed to add nothing more, then a serious question arises whether § 5324 is unconstitutionally vague. (Defense counsel moved before trial to dismiss the petitioners' case on this ground.) The petitioners' argument avoids this problem as well. See *Colautti v. Franklin*, 439 U.S. 379, 395 (1979) (relationship of *mens rea* to due process analysis of vague statute); W. LaFave & A. Scott, *supra*, § 2.3(b), at 130-31 & n.34 (1986) (collecting and critiquing cases).

The interpretation of criminal structuring adopted below treats "willfully" as used in § 5322(a) and (b) as if

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[24] See *United States v. Freed*, 401 U.S. 601, 608 (1971), discussing *Lambert v. California*, 355 U.S. 225 (1957); *Smith v. California*, 361 U.S. 147, 150, 152 (1959); *Morissette v. United States*, 342 U.S. 246 (1952).

it added nothing to § 5324, and leaves the statute, when criminally enforced, without a true *scienter* requirement. For this reason as well, the decision of the Ninth Circuit should be rejected.

D. Requiring Knowledge of One's Legal Obligation, as a Component of "Willfulness," Would Not Frustrate the Congressional Purpose Behind the Anti-Structuring Statute, Particularly if that Law Is Construed to Require a True "Intent to Evade" Rather than Merely to Avoid.

Several courts, including that below, have based their conclusion in part on the idea that requiring proof that a defendant knew of the ban on structuring would frustrate Congress's goal. See *Ratzlaf*, 976 F.2d at 1284 (requiring such proof would be inconsistent with the goal of protecting the government's right to information); J.A. 61. See generally *California Bankers Ass'n v. Schultz*, 416 U.S. 21, 26-30 (1974) (discussing purposes of Bank Secrecy Act of 1970). This Court has confronted and debunked such arguments before.

> Of course, the purpose of every statute would be 'obstructed' by requiring a finding of intent, if we assume that it had a purpose to convict without it. Therefore, the obstruction rationale does not help us to learn the purpose of the omission by congress.

Morissette v. United States, 342 U.S. 246, 259 (1952). That observation serves as well here.

1. Requiring proof of knowledge of the prohibition is consistent with the goal of reducing structuring activity.

There are several flaws in the argument that requiring proof of knowledge of one's legal duty is inconsistent with Congress's goal. First is the erroneous premise that

it would be difficult to prove knowledge of the ban on structuring. See, *e.g.*, *United States v. Dashney*, 937 F.2d 532, 539 (10th Cir.), *cert. denied*, 112 S.Ct. 402 (1991). To the contrary, such proof would be easy to obtain. It would be a simple matter for the government to post notices at banks, advising customers of the prohibition against structuring transactions. In fact, some banks already post advisements. See *United States v. Caming*, 968 F.2d 232, 234 (2d Cir. 1992). Attempts to deny knowledge in the face of such notices would pose scant barrier to conviction.[25] The "willful blindness" doctrine also protects the government against deliberate ignorance of the rules being set up to defeat the requirement of such an element. See *Spurr v. United States*, 174 U.S. 728, 735 (1899), and note 15 *ante*.

The second flaw in the "frustrate Congress's goal" argument is that it misconceives what steps actually further Congress's goal. To ensure that the government learns about cash transactions (and is not denied the information through the structuring of deposits), the essential step is to discourage structuring. But citizens cannot be discouraged from structuring unless they know that structuring is prohibited. Thus, the very step helpful for proving knowledge of the ban on structuring is also the action necessary to eliminate structuring. Informing the public about the ban on structuring would decrease

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[25] After various courts held that a willful violation of § 5316 (pertaining to reporting international transportation of currency) entailed knowledge of those requirements, the government modified Customs Form 6509-B to warn arriving travelers of the need to file a report. *United States v. Chen*, 605 F.2d 433, 435 n.3 (9th Cir. 1979). Departing travelers are frequently advised of the requirement by public address announcements, or by the prominent display of large color posters throughout airport departure areas, *United States v. Dichne*, 612 F.2d 632 (2d Cir. 1979), and at border crossings. *United States v. Salinas-Garza*, 803 F.2d 834 (5th Cir. 1986).

the incidence of structuring and readily allow conviction of those individuals who willfully structure despite their knowledge that their action is prohibited.[26] But imprisoning people who structure when they think it is permissible does not further Congress's goal at all. It neither helps to stop further structuring nor does it give the government additional information, except, of course, through the general deterrent effect – but that refers to others' learning of the ban from the fact that some have been imprisoned, which is surely the least efficient way to notify the general public.

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[26] The Treasury Department proposed, but failed to adopt, regulations to publicize the anti-structuring provision. 53 Fed.Reg. 7,948 (1988); 54 Fed.Reg. 20,398 (1988). The Department's explanation for the withdrawal of the proposal was this:

> Treasury's position continues to be that the law and legislative history are clear on this issue, that is, that the government need only prove that a criminal defendant had actual knowledge of the currency reporting requirements and the specific intent to evade them; the government need not prove that the defendant had knowledge of the structuring prohibitions.

Id. The comment makes no mention of the impact of a conscious policy *not* to inform affected individuals of the applicable law on either civil enforcement or the risk of forfeitures. This history suggests that the Department has set out to use the anti-structuring law not as a tool to stop people from structuring, but rather as a device to catch people structuring their transactions, regardless of their lack of knowledge of wrongdoing, apparently in the belief that such people must also be up to something else illegal, be it illegal gambling, drug dealing or some other cash-generating illicit enterprise, or merely tax evasion.

2. The term "evading" in § 5324 is better read as requiring true evasion and not mere avoidance.

Congress's choice of the term "evading" in § 5324 is significant in this context, as that term carries with it a large and well-settled body of law from tax evasion prosecutions under 26 U.S.C. § 7201, in which the evasion/avoidance distinction is fundamental. Yet the court below, in keeping with all the circuits, treated "evading" in the anti-structuring statute as if it meant no more than "avoiding,"[27] as does the Treasury's regulation defining the term "structure" as used in the regulatory equivalent to § 5324. *See* 31 C.F.R. §§ 103.11(p), 103.53; Stat.App. 13-15. This was error which exacerbated the effect of the erroneous construction of "willful" as used in § 5322.

When Congress uses a term with a well-recognized legal meaning, it is presumed to intend the use of that term in the sense that educated lawyers would understand it at the time of enactment. See, *e.g.*, *Taylor v. United States*, 495 U.S. 575, 592-94 (1990) ("burglary" in 1984); *McNally v. United States*, 483 U.S. 350, 358-59 (1987) ("fraud" in 1874); *Perrin v. United States*, 444 U.S. 37, 43-45 (1979) ("bribery" in 1961). The term "evade," used in the present context, has such a history and was still consistently used to mean something different from "avoid" in 1986. *See* Bittker & Lokken, *supra*; Harry Balter, Tax Fraud and Evasion ¶2.01, at 2-2 through 2-9 (5th ed. 1983). This Court first recognized the distinction between evasion and avoidance over a century ago in a criminal case which eerily foreshadows the present controversy.

In *United States v. Isham*, 17 Wall. (84 U.S.) 496 (1873), a businessman was indicted under the Civil War internal

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[27] But *cf. United States v. Baydoun*, 984 F.2d 175 (6th Cir. 1992) ("purpose of evading" element requires proof that defendant knew CTR filing was required by law, not merely by bank policy).

revenue act for issuing a series of drafts without the required tax stamps and "with intent to evade the provisions of" the Act. *Id.* at 496-97. That law required a two cent stamp to be purchased and affixed to any draft drawn upon a bank, and to any draft for a sum exceeding $10 drawn upon any other kind of company. Isham, superintendent of a mining operation in a remote area of Michigan, issued drafts drawn on the company in amounts of $1 to $10, which circulated as money in the area. No higher denominations were issued, even though merchants sometimes acquired $1000 to $2000 of them, and about $100,000 worth were issued during a year.

This Court agreed that no offense was stated under the "evasion" language of the statute and directed dismissal of the charges:

> It is said that the transaction proved upon the trial in this case, is a device to avoid the payment of a stamp duty, and that its operation is that of a fraud upon the revenue. This may be true, and if not true in fact in this case, it may well be true in other instances. To this objection there are two answers:
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> 1st. That if the device is carried out by the means of legal forms, it is subject to no legal censure. To illustrate. The Stamp Act of 1862 imposed a duty of two cents upon a bank check, when drawn for an amount not less than twenty dollars. A careful individual, having the amount of twenty dollars to pay, pays the same by handing to his creditor two checks of ten dollars each. He thus draws checks in payment of his debt in the amount of twenty dollars, and yet pays no stamp duty. This practice and this system he pursues habitually and persistently. While his operations deprive the government of the duties it might reasonably expect to receive, it is not perceived that the practice is open to the charge of fraud. He resorts to devices to avoid

> the payment of duties, but they are not illegal. He has the legal right to split up his evidences of payment, and thus to avoid the tax. The device we are considering is of the same nature.

Id. at 506. In *Isham*, as here, deliberate but forthright avoidance of the form of transaction regulated by the law does not amount to "evasion." See also *Bullen v. Wisconsin*, 240 U.S. 625, 630-31 (1916) (Holmes, J.).

The proposed construction of "evading" as having its usual meaning is also consistent with another, related crime created by Congress at the same time. Several subsections of 18 U.S.C. § 1956(a) use the phrase "designed . . . to *avoid* a transaction reporting requirement" to describe certain prohibited financial transactions which are deemed to constitute money laundering, Stat. App. 6-8, while 31 U.S.C. § 5324 uses the phrase "for the purpose of *evading*." The use of different terminology to describe related ideas in these related statutes enacted as part of the same subtitle of the 1986 Act strongly suggests that they were intended to have different meanings. That difference can only be the traditionally recognized avoidance/evasion distinction.

The construction adopted below leads to the conviction of a legitimate merchant, with gross receipts of tens of thousands per week, but well under $10,000 per day received in currency, simply for *avoiding* the filing of CTR's by making more rather than less frequent bank deposits. See *United States v. Shirk*, 981 F.2d 1382 (3d Cir. 1992), *cert. pending*, No. 92-1841. Yet according to a leading treatise:

> the Justice Department does not suggest that it would be a violation of this Subsection (3) for a depositor to arrange his activities so that he never *accumulates* a reportable sum for deposit in a financial institution. . . . This argument is reinforced by the absence of legislative history which indicates that Congress intended to reach this type of avoidance activity.

J. Villa, Banking Crimes § 6.05[1][c][ii], at 6-65 (Dec. 1992 rev.) (referring to U.S. Justice Dept., Handbook on the Anti-Drug Abuse Act of 1986, at 81-87 (1987)). Under the construction of "structures . . . for the purpose of evading" followed below, however, there is no impediment to such a prosecution.[28]

The facts of Shirk's case, involving a prosecution for "structuring" the legitimate receipts of his lawful business into his own business account, like those of the defendants' in *Aversa*, demonstrate the absurd consequences of adopting the majority view of this statute. "Evading" should be construed to mean what it says.

E. Examination of the Entire Statutory Scheme, Including Related Statutes Enacted at the Same Time, Leads to the Conclusion that "Willfully" Means "With Intent to Violate a Known Legal Duty."

In the Money Laundering Control Act of 1986, which is Title I, Subtitle H, of the Anti-Drug Abuse Act of 1986, Pub.L. 99-570, §§ 1351-1367, 100 Stat. 3207-18, Congress created four new remedies to attack what it perceived as the problem of structuring transactions for the purpose of evading the currency reporting requirements under the Bank Secrecy Act – forfeiture (Act § 1366, creating 18 U.S.C. §§ 981-982), civil penalties (Act § 1357(a), adding

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[28] As the Eleventh Circuit recently recognized, "When a person conducts cash transactions in amounts of less than $10,000 because he or she has a legitimate reason to do so, no conspiracy to structure occurs." *United States v. Brown*, 954 F.2d 1563, 1571 (11th Cir.) (*citing* S.Rep. No. 433, 99th Cong., 2d Sess. 22 (1986)), *cert. denied*, 113 S.Ct. 284 (1992). Under *Shirk*-type circumstances, at least, no inference of improper structuring could be drawn from the pattern and amounts of the deposits alone, because the proof would not make out the required "purpose of evading," as opposed to mere "avoiding" of the reporting requirement.

subsection (a)(4) to 31 U.S.C. § 5321), criminal prosecution for structuring (Act § 1354, creating 31 U.S.C. § 5324), and criminal prosecution for money laundering (Act § 1352, creating 18 U.S.C. §§ 1956(a)(1)(B)(ii), (a)(2)(B)(ii)). Examining these *in pari materia*, in their relationship to one another[29], gives further insight into the meaning of "willfulness" in 31 U.S.C. § 5322 when used in criminal enforcement of § 5324. See generally *Spies v. United States*, 317 U.S. 492, 495-97 (1943) (analyzing meaning of "attempt to evade" in 26 U.S.C. § 7201 by placing attempted criminal tax evasion in a hierarchy of tax enforcement devices).

Civil forfeiture to the United States under 18 U.S.C. § 981(a)(1)(A), Stat. App. 5, is available for any "violation" of 31 U.S.C. § 5324, without regard to intent, subject only to an "innocent owner" defense. *See* 18 U.S.C. § 981(a)(2). The civil enforcement mechanism for the anti-structuring prohibition, however, applies only to violations committed "willfully."[30] The civil remedy is imposition by the Treasury Department of a "money penalty" in an amount not to exceed the value of the coins and currency "involved in the [offending] transaction," 31 U.S.C. § 5321(a)(4)(B), reduced by the amount of any forfeiture. *Id.*(a)(4)(C). Civil and criminal penalties may be imposed on account of the same transaction. *Id.*(c), added by Act § 1357(f). Stat. App. 1-2.

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[29] *Sullivan v. Everhart*, 494 U.S. 83, 92 (1990) ("at least reasonable, if not necessary" that different sections of same Act be read *in pari materia*); *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 138 n.11 (1985) (various provisions of same Act should be read *in pari materia*); *cf. Gozlon-Peretz v. United States*, 498 U.S. 395, 407-08 (1991).

[30] The Act also created a separate, civil penalty for negligent violation of the currency reporting requirement, applicable only to financial institutions. Act § 1357(d). We exclude it from the hierarchy of penalties here, because it is not applicable to bank customers. Stat. App. 2.

Since, as discussed throughout this brief, the criminal penalty also depends on a finding of "willfulness," under *id.* § 5322(a) or (b), the question naturally arises whether the mental state was intended to be the same for civil liability as for criminal. This Court need not decide that question in this case, but the legislative history strongly supports the view that it was not. The official Treasury statement to the Senate Committee explains that "willful violations," under the civil penalty provision, are "violations made with specific intent or with reckless disregard for the law." S.Rep. No. 433, 99th Cong., 2d Sess. 26 (1986) (letter from Francis A. Keating II, Asst. Sec'y (Enforcement), Dept. of Treas., to Chairman Thurmond). Congress did not change that language in 1986, which imposes the same standard for "willfulness" that this Court has recently found to apply in other civil penalty contexts. See *Hazen Paper Co. v. Biggins*, 507 U.S. ___, 123 L.Ed.2d 338, 349-51 (April 20, 1993) (Age Discrimination in Employment Act); *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988) (Fair Labor Standards Act); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985) (ADEA).

In those cases, this Court determined that "willfulness" in the civil context means either actual knowledge of the applicable legal rules or "reckless disregard for the matter of whether [one']s conduct was prohibited by the statute." *Hazen Paper, supra*, 123 L.Ed.2d at 350, quoting *McLaughlin, supra*, 486 U.S. at 133. It would "surely" be "a fair reading of the plain language of the statute," *id.*, supported by the legislative history just mentioned, to adopt that construction for § 5321 as well. While it has the disadvantage of reading the same term, "willfully," in two different occurrences in the same statute as meaning two somewhat different things, that result can be readily justified. See *United States v. Thompson/Center Arms Co., supra*, 119 L.Ed.2d at 316 n.5 ("normal canons of construction caution us . . . , *unless there is a good reason*, to adopt a consistent interpretation of a term used in more than one

place within a statute") (emphasis added). A dual standard of "willfulness" as between § 5321 and § 5322 is consistent with the different ways that term has been used in civil penalty, as opposed to criminal, statutes. It also is consistent with the legislative history. Finally, it has the policy advantage of enforcing a distinction between a civil and a felonious violation of § 5324.[31]

Moreover, at the same time it enacted § 5324, Congress created two new true money laundering offenses, 18 U.S.C. § 1956(a)(1)(B)(ii) and (a)(2)(B)(ii), which penalize with up to 20 years' imprisonment behavior known to be "designed" to "*avoid* a transaction reporting requirement," but only if engaged in with property known to "represent" criminally derived funds. *See* G. Richard Strafer, *Money Laundering: the Crime of the '90's*, 27 Am.Crim.L.Rev. 149, 189-93 (1989). In a prosecution under § 1956 the defendant's blameworthy dealings with what are known to be proceeds of illegal activity supply an element of graver moral culpability than applies in a criminal case under sections 5324 and 5322, even if knowledge that one is violating the law is implied in the latter's "willfulness" element.

To fit a criminal case under § 5324 into the hierarchy of enforcement options between a § 5321 civil penalty action and a § 1956 money laundering indictment, it is necessary to read the "willfulness" element under § 5322 as requiring a level of intent above that necessary for a

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[31] This construction, which differentiates civil "willfulness" from criminal, has the added advantage of demonstrating that Congress did not grant unfettered and lawless enforcement discretion to the Executive to choose between civil and criminal penalties for the same conduct, undertaken with the same state of mind.

civil penalty.[32] That standard is intentional violation of a known legal duty.

F. Legislative History Does Not Support the Application of a Lower Standard of Intent.

There is no Senate or House Report directly discussing what is now § 5324. Those parts of the Congressional reports which deal with different bills that would have made the *act* of structuring illegal for the first time do not discuss the question of intent. As recognized by the Tenth Circuit, "criminal intent is not specifically addressed" in the legislative history of the 1986 amendments to the Bank Secrecy Act. *United States v. Dashney, supra,* 937 F.2d at 538; *accord,* J.A. 68 n.8 (decision below).

The legislative history clearly demonstrates Congress's awareness of the case law on § 5322. S.Rep. No. 433, 99th Cong., 2d Sess. 21 (1986); H.Rep. No. 746, 99th Cong., 2d Sess. 18-19 (1986). Indeed, as the court noted in *Aversa,* both Houses, in the drafting process, rejected alternatives to adoption of § 5322 as the mental state which would have changed the "willfully" standard to "knowingly," even though the reports on those proposals state that the change of terminology was intended to clarify not lower the intent requirement. 984 F.2d at 499-500 n.8; *see* H.Rep. No. 855, 99th Cong., 2d Sess. 7, 21-22 (1986) and H.Rep. 99-746, *supra,* at 28-29, 41. That history, while supportive of the inference that Congress adopted and carried forward the established definition of "willfully" under the existing cases, would probably not be enough to overcome clear statutory language that a

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[32] In *Aversa,* the *in banc* First Circuit majority adopted the *Thurston/McLaughlin* test as a definition of "willfulness" in criminal cases under § 5324. 984 F.2d at 498-500. That result fails to deal with the argument advanced above, at the least, and so we do not propound it. However, if this Court agrees with the First Circuit, reversal would still be required here, as the jury instruction fell far short of that standard.

conviction under § 5324(3) did not require knowledge, if such language existed. Here, however, as discussed under Point A of this Brief, the language shows that more is required than an intent to evade.

The legislative history also reflects Congress's awareness of a split in the circuits, with some cases holding that structuring was a crime under existing statutes; see, *e.g., United States v. Tobon-Builes,* 706 F.2d 1092 (11th Cir. 1983); and others holding that it was not; see, *e.g., United States v. Anzalone,* 766 F.2d 676 (1st Cir. 1985). Section 5324 was enacted to make clear that the conduct which had been held by some circuits to be unprosecutable under prior law (various combinations of 18 U.S.C. §§ 2, 371 and 1001, coupled with the Bank Secrecy Act provisions which impose duties on financial institutions alone) could be punished.

Several of the appellate decisions have seized upon what is, at most, an "implicit" reference, *Dashney, supra,* to the issue presented here. Discussing a proposed amendment to § 5313(a), which would have criminalized "structuring . . . a transaction to evade" a reporting requirement, S.Rep. 99-433, *supra,* at 21, the Senate Judiciary Committee wrote:

> For example, a person who converts $18,000 in currency to cashier's checks by purchasing two $9,000 cashier's checks at two different banks or on two different days with the specific intent that the participating bank or banks not be required to file Currency Transaction Reports for those transactions, would be subject to potential civil and criminal liability.

Id. at 22. Because this example does not mention knowledge of the anti-structuring provision, some courts, including the Ninth Circuit below, J.A. 67-68, have contended that it supports their holdings. See, *e.g., Dashney, supra,* 937 F.2d at 538; *Scanio, supra,* 900 F.2d at 491. This comment falls short of an unambiguous endorsement of

the decision below. This conclusion is supported by the Committee's qualification of its statement in the $18,000 example by mentioning "potential" criminal and civil liability. That "potential" only becomes *actual* when "willfulness" is added.

The quoted example immediately follows this statement: "[T]he proposed amendment would create the offense of structuring a transaction to evade the reporting requirements, without regard to whether an individual transaction is, itself, reportable under the Bank Secrecy Act." *Id.* This comment, while describing the act eventually prohibited under § 5324(3), also omits any reference to the "willful" requirement for criminal convictions under § 5322. Both comments are best seen as a general discussion of what is prohibited, rather than as a detailed analysis of the intent and knowledge elements of the crime.[33] *See* Welling, *supra*, 41 Fla.L.Rev. at 288 (supporting holding below, but conceding that statute was adopted "quickly and without careful analysis").

This Court faced an almost identical argument in *Liparota, supra*, where the legislative history stated that any unauthorized use of food stamps could be prosecuted. The government cited this comment to support its claim that conviction did not require proof of knowledge that a use was unauthorized. This Court responded:

> We do not believe that the omission of the word 'knowingly' is evidence that Congress devoted its attention to the issue before the Court today; it is as likely that the Committee, unaware of the

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[33] Furthermore, even putting aside the problems discussed above in the resort to legislative history, the argument does not answer the issues posed in Points A and B above regarding the wording of the statute: if willfulness is mere intent to evade, then how does a willful violation of § 5324(3) differ from a non-willful violation, and how can a single occurrence of the same term mean two different things?

> problem, simply did not realize the need to discuss the mental element needed for a conviction under § 2024(b)(1).

471 U.S. at 431 n.13. Here, too, the failure to mention the willfulness element is not evidence that Congress rejected that element. More likely, Congress was well aware that the courts already had consistently found the "willfully violates" language in § 5322 to require knowledge of the particular provision violated, and this example was simply describing the terms of the new provision. The most that could be said after examination of the legislative history is that it leaves the statutory language ambiguous.[34]

The proper definitions of "transaction," "structuring," "evading" and "willfully," at least, are not clear under this law. Accordingly, the rule of lenity requires that none of them be construed so as to extend criminal liability where, as here, there is no clear indication that Congress intended it to exist. *Liparota, supra*, 471 U.S. at 428-29 (applying rule of lenity to resolve definition of *mens rea*); *cf. United States v. Thompson/Center Arms Co., supra*, 504 U.S. ___, 119 L.Ed.2d at 319-20 & n.10 (plurality) and *id.* at 320, 323 (concurring opinion) (applying rule to non-complex tax, because provision is also criminally-enforceable). "At the very least," as the Chief Justice has written, where "the issue is subject to some doubt," the Court will "adhere to the familiar rule that, 'where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant.' " *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 284-85 (1978) (quoting

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[34] In any event, legislative history may not be invoked to defeat the operation of the rule of lenity in the construction of a criminal statute. *United States v. R.L.C.*, 503 U.S. ___, 117 L.Ed.2d 559, 573-77 (March 24, 1992) (Scalia, J., concurring in the judgment with Kennedy & Thomas, JJ.).

United States v. Bass, 404 U.S. 336, 348 (1971)).[35] See also *United States v. Kozminski*, 487 U.S. 931, 952 (1988).

In *McNally v. United States*, 483 U.S. 350, 359-60 (1987), this Court stated that "when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language." Where, as here, there is at least legitimate doubt as to the meaning of the term "willfully" in § 5322(a) and (b) or the term "evade" in § 5324, then that doubt must be resolved in favor of the criminally accused.

G. The Error in Instructing the Jury Was Both Inherently and Actually Prejudicial.

For all the foregoing reasons, there was fundamental error in the trial court's instructions to the petitioners' jury. This Court has consistently held that "matters of intent are for the jury to consider." *McCormick v. United States*, 500 U.S. ___, 114 L.Ed.2d 307, 324 (May 23, 1991).[36] The judgment below must necessarily be "set aside and a new trial ordered." *Id.*

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[35] See also, *e.g.*, *Hughey v. United States*, 495 U.S. 411, 422 (1990); *Tanner v. United States*, 483 U.S. 107, 131-32 (1987); *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952). The rule of lenity is "an outgrowth of [this Court's] reluctance to increase or multiply punishments absent a clear and definite legislative directive." *Busic v. United States*, 446 U.S. 398, 406-07 (1980). "The rule is also the product of an awareness that legislators and not the courts should define criminal activity" and allowable punishments. *Huddleston v. United States*, 415 U.S. 814, 831 (1974).

[36] Indeed, a significant misstatement of the elements of a criminal offense, including the mental element, or of what facts may establish the offense, constitutes plain error. *Pipefitters Local 562 v. United States*, 407 U.S. 385, 440-42 & n.52 (1972); *Screws v. United States*, 325 U.S. 91, 107 (1945) (plurality).

Even if prejudice needed to be shown, it is clear that the error in instructing on the intent element in this case was severely prejudicial. Viewed in the light most favorable to the government, the evidence showed that petitioners at some point after purchasing cashier's checks at Nevada Banking Company may have become aware of the banks' reporting obligations with respect to aggregation of related transactions and deliberately thereafter conducted cash transactions to obtain cashier's checks so that the banks would not know they should file CTRs. But no evidence showed that either petitioner knew structuring was illegal.

Congress did not intend the conduct proven in this case to be treated as a crime, and no crime was proven. In addition to the four structuring counts, the counts charging conspiracy and interstate travel must fall as well, since each of them incorporates a purpose to commit criminal structuring. The jury instructions presented this case on a prejudicially low standard of criminal intent. At least a new trial is required as the remedy.

CONCLUSION

For each of the foregoing reasons, petitioners Waldemar and Loretta Ratzlaf pray that this Court reverse the judgment of the United States Court of Appeals for the Ninth Circuit affirming their convictions and sentences, and direct the court of appeals to remand for a new trial or other appropriate proceedings.

Respectfully submitted,

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July 20, 1993.

INDEX TO APPENDIX OF STATUTES AND REGULATIONS

APPENDIX

STATUTES AND REGULATIONS INVOLVED

The Currency and Foreign Transactions Reporting Act, part of the Bank Secrecy Act of 1970, Pub.L. 91-508, tit. II, 84 Stat. 1118, codified at 31 U.S.C. § 5313, provides, in part:

> (a) when a domestic financial institution is involved in a transaction for the payment, receipt, or transfer of United States coins or currency (or other monetary instruments the Secretary of the Treasury prescribes), in an amount, denomination, or amount and denomination, or under circumstances the Secretary prescribes by regulation, the institution and any other participant in the transaction the Secretary may prescribe shall file a report on the transaction at the time and in the way the Secretary prescribes. . . .

The civil enforcement provision states, in pertinent part:

§ 5321. Civil penalties

(a) . . . .

* * *

> **(4) Structured transaction violation.–**
>
> (A) **Penalty authorized.** – The Secretary of the Treasury may impose a civil money penalty on any person who willfully violates any provision of section 5324.
>
> (B) **Maximum amount limitation.** – The amount of any civil money penalty imposed under subparagraph (A) shall not exceed the amount of the coins and currency (or such other

monetary instruments as the Secretary may prescribe) involved in the transaction with respect to which such penalty is imposed.

(C) **Coordination with forfeiture provision.** – The amount of any civil money penalty imposed by the Secretary under subparagraph (A) shall be reduced by the amount of any forfeiture to the United States in connection with the transaction with respect to which such penalty is imposed.

* * *

(6) **Negligence.** –

(A) **In general.** – The Secretary of the Treasury may impose a civil money penalty of not more than $500 on any financial institution which negligently violates any provision of this subchapter or any regulation prescribed under this subchapter.

(B) **Pattern of negligent activity.** – If any financial institution engages in a pattern of negligent violations of any provision of this subchapter or any regulation prescribed under this subchapter, the Secretary of the Treasury may, in addition to any penalty imposed under subparagraph (A) with respect to any such violation, impose a civil money penalty of not more than $50,000 on the financial institution.

* * *

(d) **Criminal penalty not exclusive of civil penalty.** – A civil money penalty may be imposed under subsection (a) with respect to any violation of this subchapter notwithstanding the fact that a criminal penalty is imposed with respect to the same violation.

(Pub.L. 97-258, Sept. 13, 1982, 96 Stat. 999; Pub.L. 98-473, Title II, § 901(a), Oct. 12, 1984, 98 Stat. 2135; Pub.L. 99-570, Title I, §§ 1356(c)(1), 1357(a)-(f), (h), Oct. 27, 1986, 100 Stat. 3207-24, 3207-25, 3207-26; Pub.L. 100-690, Title VI, § 6185(g)(2), Nov. 18, 1988, 102 Stat. 4357; Pub.L. 102-550, Title XV, §§ 1511(b), 1525(b), 1535(a)(2), 1561(a), Oct. 28, 1992, 106 Stat. 4057, 4065, 4066, 4071.)

The criminal enforcement provision, codified at 31 U.S.C. § 5322, states, in pertinent part:

> (a) A person willfully violating this subchapter or a regulation prescribed under this subchapter . . . shall be fined not more than $250,000, or imprisoned for not more than five years, or both.
>
> (b) A person willfully violating this subchapter or a regulation prescribed under this subchapter . . . , while violating another law of the United States or as part of a pattern of illegal activity involving transactions of more than $100,000 in a 12-month period, shall be fined not more than $500,000, imprisoned not more than 10 years, or both.
>
> * * *

The Anti-Drug Abuse Act of 1986, Pub.L. 99-570, tit. I, subtit. H (Money Laundering Control Act of 1986), § 1354(a), 100 Stat. 3207-22, amended the Currency and Foreign Transactions Reporting Act by adding the following section:

§ 5324. Structuring transactions to evade reporting requirement prohibited

No person shall for the purpose of evading the reporting requirements of section 5313(a) with respect to such transaction –

> (1) cause or attempt to cause a domestic financial institution to fail to file a report required under section 5313(a);
>
> (2) cause or attempt to cause a domestic financial institution to file a report required under section 5313(a) that contains a material omission or misstatement of fact; or
>
> (3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions.

31 U.S.C. § 5324 (as added October 27, 1986, effective January 27, 1987), recodified in 1992 as § 5324(a).

Related provisions of the federal criminal code include civil and criminal forfeiture provisions and a criminally-enforced prohibition on money laundering, which state, in pertinent part:

§ 981. Civil forfeiture

(a)(1) Except as provided in paragraph (2), the following property is subject to forfeiture to the United States:

> (A) Any property, real or personal, involved in a transaction or attempted transaction in violation of section 5313(a) or 5324(a) of title 31, or of section 1956 or 1957 of this title, or any property traceable to such property. However, no property shall be seized or forfeited in the case of a violation of section 5313(a) of title 31 by a domestic financial institution examined by a Federal bank supervisory agency or a financial institution regulated by the Securities and Exchange Commission or a partner, director, or employee thereof.
>
> * * *

§ 982. Criminal forfeiture

(a)(1) The court, in imposing sentence on a person convicted of an offense in violation of section 5313(a), 5316 or 5324 of title 31, or of section 1956, 1957, or 1960 of this title, shall order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property. However, no property shall be seized or forfeited in the case of a violation of section 5313(a) of title 31 by a domestic financial institution examined by a Federal bank supervisory agency or a financial institution regulated by the

Securities and Exchange Commission or a partner, director, or employee thereof.

* * *

§ 1956. Laundering of monetary instruments

(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity –

(A)(i) with the intent to promote the carrying on of specified unlawful activity; or

(ii) with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986; or

(B) knowing that the transaction is designed in whole or in part –

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law,

shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.

(2) Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to

or through a place outside the United States or to a place in the United States from or through a place outside the United States –

(A) with the intent to promote the carrying on of specified unlawful activity; or

(B) knowing that the monetary instrument or funds involved in the transportation, transmission, or transfer represent the proceeds of some form of unlawful activity and knowing that such transportation, transmission, or transfer is designed in whole or in part –

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law.

shall be sentenced to a fine of $500,000 or twice the value of the monetary instrument or funds involved in the transportation, transmission, or transfer, whichever is greater, or imprisonment for not more than twenty years, or both. For the purpose of the offense described in subparagraph (B), the defendant's knowledge may be established by proof that a law enforcement officer represented the matter specified in subparagraph (B) as true, and the defendant's subsequent statements or actions indicate that the defendant believed such representations to be true.

(3) Whoever, with the intent –

(A) to promote the carrying on of specified unlawful activity;

(B) to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity; or

(C) to avoid a transaction reporting requirement under State or Federal law,

conducts or attempts to conduct a financial transaction involving property represented to be the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity, shall be fined under this title or imprisoned for not more than 20 years, or both. For purposes of this paragraph and paragraph (2), the term "represented" means any representation made by a law enforcement officer or by another person at the direction of, or with the approval of, a Federal official authorized to investigate or prosecute violations of this section.

(b) Whoever conducts or attempts to conduct a transaction described in subsection (a)(1), or a transportation, transmission, or transfer described in subsection (a)(2), is liable to the United States for a civil penalty of not more than the greater of –

(1) the value of the property, funds, or monetary instruments involved in the transaction; or

(2) $10,000.

(c) As used in this section –

(1) the term "knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity" means that the person knew the property

involved in the transaction represented proceeds from some form, though not necessarily which form, of activity that constitutes a felony under State, Federal, or foreign law, regardless of whether or not such activity is specified in paragraph (7);

(2) the term "conducts" includes initiating, concluding, or participating in initiating, or concluding a transaction;

(3) the term "transaction" includes a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition, and with respect to a financial institution includes a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, certificates of deposit, or other monetary instrument, use of a safe deposit box, or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected;

(4) the term "financial transaction" means (A) a transaction which in any way or degree affects interstate or foreign commerce (i) involving the movement of funds by wire or other means or (ii) involving one or more monetary instruments, or (iii) involving the transfer of title to any real property, vehicle, vessel, or aircraft, or (B) a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree;

(5) the term "monetary instruments" means (i) coin or currency of the United States or of any other country, travelers' checks, personal checks, bank checks, and money orders, or

(ii) investment securities or negotiable instruments, in bearer form or otherwise in such form that title thereto passes upon delivery;

(6) the term "financial institution" has the definition given that term in section 5312(a)(2) of title 31, United States Code, or the regulations promulgated thereunder;

(7) the term "specified unlawful activity" means –

(A) any act or activity constituting an offense listed in section 1961(1) of this title except an act which is indictable under subchapter II of chapter 53 of title 31;

(B) with respect to a financial transaction occurring in whole or in part in the United States, an offense against a foreign nation involving –

(i) the manufacture

(ii) kidnaping, robbery, or extortion; or

(iii) fraud, or any scheme or attempt to defraud, by or against a foreign bank (as defined in paragraph 7 of section 1(b) of the International Banking Act of 1978;

[1]importation, sale, or distribution of a controlled substance (as such term is defined for the purposes of the Controlled Substances Act);

(C) any act or acts constituting a continuing criminal enterprise, as that term is defined in section 408 of the Controlled Substances Act (21 U.S.C. 848);

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[1] So in original.

(D) an offense under section 152 (relating to concealment of assets; false oaths and claims; bribery), section 215 (relating to commissions or gifts for procuring loans), any of sections 500 through 503 (relating to certain counterfeiting offenses), section 513 (relating to securities of States and private entities), section 542 (relating to entry of goods by means of false statements), section 545 (relating to smuggling goods into the United States), section 549 (relating to removing goods from Customs custody), section 641 (relating to public money, property, or records), section 656 (relating to theft, embezzlement, or misapplication by bank officer or employee), section 657 (relating to lending, credit, and insurance institutions), section 658 (relating to property mortgaged or pledged to farm credit agencies), section 666 (relating to theft or bribery concerning programs receiving Federal funds), section 793, 794, or 798 (relating to espionage), section 875 (relating to interstate communications), section 1005 (relating to fraudulent bank entries), 1006 (relating to fraudulent Federal credit institution entries), 1007 (relating to Federal Deposit Insurance transactions), 1014 (relating to fraudulent loan or credit applications), 1032 (relating to concealment of assets from conservator, receiver, or liquidating agent of financial institution), section 1201 (relating to kidnaping), section 1203 (relating to hostage taking) section 1708 (theft from the mail, section 2113 or 2114 (relating to bank and postal robbery and theft), or section 2319 (relating to copyright infringement), of this title, a felony violation of the Chemical Diversion and Trafficking Act of 1988 (relating to precursor and essential chemicals), section 590 of the Tariff

Act of 1930 (19 U.S.C. 1590) (relating to aviation smuggling), section 422 of the Controlled Substances Act (relating to transportation of drug paraphernalia), section 38(c) (relating to criminal violations) of the Arms Export Control Act, section 11 (relating to violations) of the Export Administration Act of 1979, section 206 (relating to penalties) of the International Emergency Economic Powers Act, section 16 (relating to offenses and punishment) of the Trading with the Enemy Act, any felony violation of section 9(c) of the Food Stamp Act of 1977 (relating to food stamp fraud) involving a quantity of coupons having a value of not less than $5,000, or any felony violation of the Foreign Corrupt Practices Act; or

(E) a felony violation of the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.), the Ocean Dumping Act (33 U.S.C. 1401 et seq.), the Act to Prevent Pollution from Ships (33 U.S.C. 1901 et seq.), the Safe Drinking Water Act (42 U.S.C. 300f et seq.), or the Resources Conservation and Recovery Act (42 U.S.C. 6901 et seq.).

(8) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

(d) Nothing in this section shall supersede any provision of Federal, State, or other law imposing criminal penalties or affording civil remedies in addition to those provided for in this section.

* * *

(Added Pub.L. 99-570, Title XIII, § 1352(a), Oct. 27, 1986, 100 Stat. 3207-18 and amended Pub.L. 100-690, Title VI,

§§ 6183, 6465, 6566, 6469(a)(1), 6471(a), (b), Title VII, § 7031, Nov. 18, 1988, 102 Stat. 4354, 4375, 4377, 4378, 4398; Pub.L. 101-647, Title I, §§ 105-108, Title XII, § 1205(j), Title XIV, §§ 1402, 1404, Title XXV, § 2506, Title XXXV, § 3657, Nov. 29, 1990, 104 Stat. 4791, 4792, 4831, 4835, 4862, 4927; Pub.L. 102-550, Title XV, §§ 1504(c), 1524, 1526(a), 1527(a), 1530, 1531, 1534, 1536, Oct. 28, 1992, 106 Stat. 4055, 4064, 4065, 4066, 4067.)

The Treasury Department's implementing regulations, 31 C.F.R., part 103, provide, in pertinent part:

§ 103.11 Meaning of terms.

When used in this part and in forms prescribed under this part, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, terms shall have the meanings ascribed in this section.

* * *

(e) **Currency.** The coin and paper money of the United States or of any other country that is designated as legal tender and that circulates and is customarily used and accepted as a medium of exchange in the country of issuance. Currency includes U.S. silver certificates, U.S. notes and Federal Reserve notes. . . .

* * *

(p) **Structure (structuring).** For purposes of section 103.53, a person structures a transaction if that person, acting alone, or in conjunction with, or on behalf of, other persons, conducts or attempts to conduct one or more transactions in currency, in any amount, at one or more financial institutions, on one or more days, in any manner, for the purpose of evading

the reporting requirements under section 103.22 of this Part. "In any manner" includes, but is not limited to, the breaking down of a single sum of currency exceeding $10,000 into smaller sums, including sums at or below $10,000 or the conduct of a transaction, or series of currency transactions, including transactions at or below $10,000. The transaction or transactions need not exceed the $10,000 reporting threshold at any single financial institution on any single day in order to constitute structuring within the meaning of this definition.

103.21 Determination by the Secretary.

The Secretary hereby determines that the reports required by this sub-part have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.

103.22 Reports of currency transactions.

(a)(1) Each financial institution other than a casino or the Postal Service shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution which involves a transaction in currency of more than $10,000. Multiple currency transactions shall be treated as a single transaction if the financial institution has knowledge that they are by or on behalf of any person and result in either cash in or cash out totalling[2] more than $10,000 during any one business day. Deposits made at night or over a weekend or holiday shall be treated as if received on the next business day following deposit.

(2) Each casino shall file a report of each deposit, withdrawal, exchange of currency, gambling tokens or chips, or other payment or

transfer, by, through, or to such casino which involves a transaction in currency of more than $10,000. Multiple currency transactions shall be treated as a single transaction if the casino has knowledge that they are by or on behalf of any person and result in either cash in or cash out totalling[2] more than $10,000 during any twenty-four hour period.

* * *

§ 103.53 Structured transactions.

No person shall for the purpose of evading the reporting requirements of § 103.22 with respect to such transaction:

(a) Cause or attempt to cause a domestic financial institution to fail to file a report required under § 103.22;

(b) Cause or attempt to cause a domestic financial institution to file a report required under § 103.22 that contains a material omission or misstatement of fact; or

(c) structure (as that term is defined in § 103.11(n) [sic; apparently meaning (p)] of this Part) or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions.

[52 FR 11446, Apr. 8, 1987, as amended at 54 FR 3027, Jan. 23, 1989]

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[2] So in original.

(6)

No. 92-1196

In the Supreme Court of the United States

OCTOBER TERM, 1993

WALDEMAR RATZLAF AND LORETTA RATZLAF,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

In a prosecution for willfully violating 31 U.S.C. 5324(3) by structuring currency transactions with one or more domestic financial institutions "for the purpose of evading the reporting requirements of [31 U.S.C.] 5313(a)," whether the government must prove that petitioners knew that structuring for that purpose was unlawful.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A40) is reported at 976 F.2d 1280.

JURISDICTION

The judgment of the court of appeals was entered on October 6, 1992. On January 4, 1993, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including January 19, 1993. The petition for a writ of certiorari was filed on January 14, 1993, and was granted on April 26,

1993. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

31 U.S.C. 5313 provides in pertinent part as follows:

> (a) When a domestic financial institution is involved in a transaction for the payment, receipt, or transfer of United States coins or currency (or other monetary instruments the Secretary of the Treasury prescribes), in an amount, denomination, or amount and denomination, or under circumstances the Secretary prescribes by regulation, the institution and any other participant in the transaction the Secretary may prescribe shall file a report on the transaction at the time and in the way the Secretary prescribes. A participant acting for another person shall make the report as the agent or bailee of the person and identify the person for whom the transaction is being made.
>
> * * * * *

31 U.S.C. 5322 provides in pertinent part as follows:

> (a) A person willfully violating this subchapter [31 U.S.C. 5311 *et seq.*] or a regulation prescribed under this subchapter (except section 5315 of this title or a regulation prescribed under section 5315) shall be fined not more than $250,000, or imprisonment [imprisoned for] not more than five years, or both.
>
> (b) A person willfully violating this subchapter or a regulation prescribed under this subchapter (except section 5315 of this title or a regulation prescribed under section 5315),

> while violating another law of the United States or as part of a pattern of any illegal activity involving more than $100,000 in a 12-month period, shall be fined not more than $500,000, imprisoned for not more than 10 years, or both.
>
> * * * * *

31 U.S.C. 5324 [1] provides as follows:

> No person shall for the purpose of evading the reporting requirements of section 5313(a) with respect to such transaction—
>
> (1) cause or attempt to cause a domestic financial institution to fail to file a report required under section 5313(a);
>
> (2) cause or attempt to cause a domestic financial institution to file a report required under section 5313(a) that contains a material omission or misstatement of fact; or
>
> (3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions.

31 C.F.R. 103.22 provides in pertinent part as follows:

> (a)(1) Each financial institution other than a casino or the Postal Service shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution which involves a transaction in currency of more than $10,000.

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[1] Subsequent to the court of appeals' decision in this case, Congress amended Section 5324 to add a subsection (b). It recodified Section 5324(1)-(3) as Section 5324(a)(1)-(3), without substantive change. See Annunzio-Wylie Anti-Money Laundering Act, Pub. L. No. 102-550, Tit. XV, § 1525(a), 106 Stat. 4064 (1992). For simplicity, we refer to the codification in effect when the court of appeals issued its decision.

Multiple currency transactions shall be treated as a single transaction if the financial institution has knowledge that they are by or on behalf of any person and result in either cash in or cash out totalling more than $10,000 during any one business day. Deposits made at night or over a weekend or holiday shall be treated as if received on the next business day following the deposit.

(2) Each casino shall file a report of each deposit, withdrawal, exchange of currency, gambling tokens or chips, or other payment or transfer, by, through, or to such casino which involves a transaction in currency of more than $10,000. Multiple currency transactions shall be treated as a single transaction if the casino has knowledge that they are by or on behalf of any person and result in either cash in or cash out totalling more than $10,000 during any twenty-four hour period.

STATEMENT

Following a jury trial in the United States District Court for the District of Nevada, petitioner Waldemar Ratzlaf was convicted on four counts of structuring currency transactions, in violation of 31 U.S.C. 5322(a) and 5324(3). Both petitioners were convicted of conspiring to violate the federal anti-structuring laws, in violation of 18 U.S.C. 371, and of interstate travel in aid of racketeering, in violation of 18 U.S.C. 1952(a)(3). Waldemar Ratzlaf was sentenced to 15 months in prison, to be followed by three years of supervised release, and was fined $26,300. Loretta Ratzlaf was sentenced to five years' probation, including ten months of home detention, and was fined $7,900. The court of appeals affirmed. J.A. 51-69.

1. a. Petitioner Waldemar Ratzlaf was a high-stakes gambler who frequently won and lost large sums of money. Tr. 108-109, 115-118, 165, 181, 188, 205-212, 310.[2] The records of the Internal Revenue Service showed that Waldemar had engaged in large cash transactions with casinos in 1986, but that he had reported no gambling income for that tax year. Accordingly, on May 4, 1988, the IRS informed Waldemar that petitioners' tax return for 1986 was being audited. 4/10/91 Tr. 7-8, 10-11, 13.[3]

In auditing petitioners' return, the IRS conducted a "bank deposit analysis," comparing petitioners' total bank deposits with their income. That analysis disclosed a discrepancy of more than $22,000 for 1986. 4/10/91 Tr. 11, 25-27. Waldemar failed to identify any gambling income for tax year 1986 during his first interview with IRS Agent Connie Fox on May 24, 1988. When confronted with the results of Agent Fox's bank deposit analysis, however, Waldemar and

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[2] For example, Waldemar Ratzlaf won $134,200 during a three-day visit to Caesar's Lake Tahoe in March 1988 and lost $40,000 in one day at the same casino on January 2, 1989. Tr. 115-116. Waldemar's average winnings were more than $15,000 per visit during his eight visits to that casino between October 1987 and January 1989. Tr. 116, 135. During one of his visits, Waldemar's average bet was $12,000. Tr. 117-118. At Harvey's Resort Hotel, he was among the top ten percent of customers. Tr. 188, 208. During six visits to Harvey's between April and December 1988, Waldemar's average bet was more than $6,000, and his net losses totaled more than $94,000. Tr. 212; see Tr. 205-212.

[3] The April 10, 1991, testimony of IRS Agent Connie Fox, who conducted the audit, is not paginated sequentially with the rest of the transcript. We identify the transcript covering her April 10, testimony as "4/10/91 Tr."

petitioners' accountant acknowledged increasingly large amounts of gambling income for that year. *Id.* at 22, 34-35.[4] After the IRS expanded the audit beyond 1986, petitioners acknowledged substantial unreported gambling income for 1985 and 1987 as well.[5] Following her interviews with Waldemar and petitioners' accountant on July 11 and 12, 1988, Agent Fox concluded that petitioners had unreported income of $14,000 for 1985, $23,200 for 1986, and $101,330 for 1987—figures well in excess of those previously indicated by petitioners. Tr. 277-279.[6]

In addition to the bank deposit analysis, Agent Fox attempted to ascertain whether petitioners had undeposited gambling earnings. During the audit, Fox repeatedly asked whether Waldemar kept cash from gambling earnings stored in his office safe or at his home. 4/10/91 Tr. 30, 38-41, 55. Waldemar explained that he kept his cash winnings in a safe in his restaurant and deposited them in his bank account as needed. *Id.* at 39. Waldemar told Agent Fox that he had approximately $15,000 in the safe at the end of 1986, but that he and his wife had deposited that cash in the bank during 1987. He also indicated that he had between $8,000 and $10,000 in the safe at the end of 1987, but had deposited it in early 1988. *Id.* at 41-42. He added that he usually kept between $1,300 and $1,500 in cash on hand. *Id.* at 40. When Fox asked Waldemar whether he had any cash "left in the mattress or in the backyard or that sort of thing," Waldemar replied that he did not. *Id.* a 55. At trial, however, Waldemar conceded that he had kept business and gambling income, including winnings of $134,000 from March 1988, in a piece of furniture in his bedroom. Tr. 1325, 1368.

b. On October 20, 1988, Waldemar Ratzlaf lost substantial sums of money gambling at the High Sierra Casino in Nevada. At Waldemar's request, the casino increased his line of credit to $160,000. Waldemar then ran his losses up to $160,000, exhausting his credit limit. The casino gave him one week to pay the debt. J.A. 54-55; Tr. 312-316.

On October 27, 1988, petitioners returned to the High Sierra with a shopping bag full of cash to pay off their debt. Tr. 318. Waldemar told the casino's shift manager that he wanted to pay off his markers, but did not want "any paperwork" filled out. *Ibid.*[7]

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[4] Waldemar at first conceded that he had perhaps won "a couple of thousand" dollars in gambling in 1986. The next day, Waldemar increased that figure to $8,000. 4/10/91 Tr. 27-29. Several weeks later, Waldemar's accountant informed Fox that Ratzlaf's gambling earnings for 1986 were more than $13,000. *Id.* at 34-35.

[5] On June 21, 1988, petitioners' accountant gave Agent Fox a revised income schedule for 1987 indicating that more than $46,000 in gambling income had been deposited into petitioners' accounts that year. 4/10/91 Tr. 18, 30-31, 37-38. On July 11, 1988, the accountant provided a revised income schedule indicating unreported gambling income of $13,150 for 1985, $13,625 for 1986, and $46,900 for 1987. *Id.* at 47-50.

[6] On July 13, 1988, Agent Fox referred the case to the IRS's criminal investigation division. Tr. 246-248. Waldemar was contacted by a criminal investigator on November 15, 1988. Tr. 1263.

[7] At approximately the same time, after Waldemar made several large cash payments to Caesar's Lake Tahoe, Caesar's filed three currency transaction reports with the Nevada State Gaming Board. On October 29, 1988, Waldemar in-

When the shift manager told casino vice president Stephen Allmaras about the situation, Allmaras explained to Waldemar that a casino is like a bank and cannot accept a cash payment of more than $10,000 without filling out a report.[8] Allmaras, however, told Waldemar that he could accept a check without having to fill out a report. Tr. 322-324; Pet. App. 9-10.

Accompanied by Ron Hunt, a High Sierra employee, petitioners went to several banks in and around Stateline, Nevada, and South Lake Tahoe, California. At the First Interstate Bank in Stateline, Waldemar and Loretta Ratzlaf each purchased a cashier's check for cash in the amount of $9,500. Tr. 463-466. Those purchases formed the basis of the structuring charges in Counts 2 and 3 of the indictment. J.A. 11-12.

Petitioners then went to the Nevada Banking Company in Stateline, where each petitioner made another cash purchase of a $9,500 cashier's check. Tr. 471-472. Initially, Loretta asked to buy a cashier's check for an amount exceeding $10,000. When the teller told her that a form would have to be filled out, Loretta asked instead to purchase two $9,500 cash-

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structed Caesar's credit officer to monitor his cash transactions so that his payments did not exceed $10,000. Tr. 102, 126-130, 179, 181-183.

[8] Under federal regulations, casinos have a currency transaction reporting requirement similar to that of banks. See 31 C.F.R. 103.22(a)(2). Nevada casinos, however, do not file currency transaction reports directly with the federal government. Under an arrangement between federal and state authorities, Nevada casinos file a comparable report with state gaming authorities, and the state authorities transmit copies of the reports to federal authorities. Tr. 319-320; see 31 C.F.R. 103.45(c).

ier's checks—one in her name and one in Waldemar's name. Tr. 474-476. The structuring charges in Counts 4 and 5 of the indictment were based on those purchases. J.A. 13-14.

Petitioners next traveled to California to purchase additional cashier's checks. At the Truckee River Bank in South Lake Tahoe, California, Waldemar tried to make two cash purchases of $9,500 cashier's checks for himself and Loretta. The teller, however, told him that a report would have to be filled out because the transaction involved more than $10,000 in cash. Tr. 507-510. After Hunt protested, a supervisor came over and told petitioners that the bank would fill out a currency transaction report because more than $10,000 was crossing the teller's window. Tr. 514, 518, 576, 597-598. At that point, Hunt requested the return of $9,500 to petitioners, and Loretta purchased only a single cashier's check for $9,500. Tr. 518-520, 577, 598.[9]

At their next stop, the Bank of America in South Lake Tahoe, petitioners each purchased a $9,500 cashier's check for cash at separate teller's windows. Tr. 622-627, 698-700. Petitioners then went to the Security Pacific National Bank in South Lake Tahoe. Again, Waldemar and Loretta went to separate teller's windows and each sought to make a cash purchase of a $9,500 cashier's check. Tr. 634-635, 715-719. After Waldemar purchased his check and left the bank, the two tellers assisting petitioners encountered each other taking the cash from petitioners'

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[9] The bank filled out a "suspicious" transaction report, which it may do if a currency transaction report is not required but the bank is concerned about the legality of the transaction. Tr. 521.

purchases to the vault. Tr. 635-636, 721. Because the circumstances appeared suspicious, a supervisor approached Loretta and explained that the bank would have to fill out a currency transaction report. Tr. 637-639, 641, 721-723. Loretta then stated that she did not want to have a report filled out and asked for the money back. Tr. 642.

Finally, petitioners went to the Central Bank in South Lake Tahoe. Petitioners again went to separate teller's windows to buy $9,500 cashier's checks with cash. Tr. 651; see Exhs. 36, 37. When the teller assisting Loretta noticed that another teller was performing a similar transaction for Waldemar, the tellers reported the situation to their supervisor. Tr. 652-653, 778-770. One of the tellers then informed Loretta that a currency transaction report would have to be filed. Loretta cancelled the transaction and left. Tr. 654-657, 780, 787. Waldemar took his money and left without completing the transaction. Tr. 786-787.

Petitioners' activities in South Lake Tahoe were not charged as structuring offenses; instead, they formed the basis of the charge of interstate travel in aid of unlawful activity in Count 6 of the indictment. J.A. 14-15.

After acquiring the various cashier's checks, petitioners went back to the High Sierra and made a partial payment on their debt. Waldemar paid $76,000 in cashier's checks, $60,000 in chips, and $4,000 in money on deposit with the casino. Tr. 396-398. The next day, the balance was paid. Tr. 401.[10]

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[10] Soon after petitioners returned to their residence in Portland, Oregon, they engaged in several similar transactions to pay off other gambling debts. Tr. 806-807, 816-818, 825-827, 845-849, 937-939, 940-946.

2. At trial, the district judge gave the jury the following instructions on the structuring charges:

> The essential elements required to be proven beyond a reasonable doubt in order to establish the offenses * * * which are violations of [31 U.S.C. 5322(a) and 5324(3)] * * * are as follows:
>
> First, [petitioners] had knowledge of a financial institution's duty to report currency transactions in excess of ten thousand dollars.
>
> Second, with such knowledge, [petitioners] knowingly and willfully structured or assisted in structuring or attempted to structure or assist in structuring a currency transaction.
>
> Third, the purpose of the structured or attempted transaction was to evade the transaction reporting requirements.
>
> And, fourth, the structured transactions involved one or more domestic financial institutions.
>
> An act is * * * done knowingly and willfully for the purpose of [31 U.S.C. 5322(a) and 5324(3)] if [petitioners], with knowledge of a financial institution's duty to report currency transactions in excess of ten thousand dollars, voluntarily or intentionally structured or assisted in the structuring or attempted to structure or assist in the structuring [of] a currency transaction with the purpose of evading the currency reporting requirement.
>
> The government does not have to prove that [petitioners] knew the structuring was unlawful[,] nor does the government have to prove that [petitioners] knew of the existence of the law which they are charged with breaking, [31 U.S.C. 5322(a) and 5324(3)]. However, if a

> [petitioner] did not have knowledge of a bank's duty to report currency transactions in excess of ten thousand dollars, that may be considered a defense.
>
> It is not a defense that [petitioners] did not know that structuring itself is a violation of law or of the existence of [31 U.S.C. 5322(a) and 5324(3)].
>
> If you find that structuring occurred, and was knowingly and willfully engaged in by defendants for the specific purpose of evading a reporting requirement that was known by the defendants to exist, that is sufficient.
>
> Only a person who has deliberate intention to frustrate the reporting by the banks can be guilty of the offense of structuring.

Tr. 2126-2127; J.A. 27-29.

3. In affirming petitioners' convictions, the court of appeals held that a willful violation of the anti-structuring statute requires proof that petitioners structured currency transactions with the intent to evade reporting requirements imposed by law, but that knowledge that structuring is illegal is not necessary for conviction. The court reasoned that "knowledge of illegality is not required to convict for 'structuring' because such conduct is 'affirmative' and 'demonstrate[s] an awareness of the legal framework relative to currency transactions which, it is reasonable to conclude, should * * * alert[] [the defendant] to the consequences of his conduct.'" J.A. 60 (quoting *United States* v. *Scanio*, 900 F.2d 485, 490 (2d Cir. 1990)).

As the court further explained, "[i]f a defendant knows that the bank must report a currency transaction and then intentionally acts in a way to prevent

that, he has acted 'willfully.'" J.A. 68. "There is no danger that someone who does *not* know of the reporting requirements could be convicted under that *mens rea* standard; nor is there any way that one who knows of the reporting requirements but who *does not intend* to prevent such reporting can be convicted of structuring." *Id.* at 68-69. No one can be convicted of violating Section 5324(3), the court concluded, "unless he or she knows of the reporting requirements *and* * * * he or she is doing something to prevent such reporting." J.A. 69.

The court observed that nothing in the language or history of Section 5324(3) suggests that the statute requires knowledge that structuring is illegal. The court noted that Section 5324(3) was enacted in 1986 because several courts of appeals had held that it was not unlawful to structure currency transactions to avoid federal reporting requirements. The court explained that Section 5324(3) was designed to overturn the effect of those decisions and confirm the rulings of other courts that structuring of currency transactions constituted a criminal offense. J.A. 66-67.

The court of appeals also emphasized there was no risk that petitioners had been convicted for "innocent" conduct. It observed that petitioners "took no steps to ensure that the IRS would be aware of the assets used to purchase the cashiers checks; denied that they earned money gambling when in fact they had done so; denied any failure to report gambling income; and apparently hid large amounts of currency in or near their homes." J.A. 69. Hence, petitioners could not be "compared to an individual involved in perfectly ordinary business transactions who unconsciously breaks the currency laws." *Ibid.*

SUMMARY OF ARGUMENT

A. In 1970, Congress enacted legislation that, *inter alia*, requires domestic financial institutions or their customers to file currency transaction reports under circumstances prescribed by the Secretary of the Treasury. 31 U.S.C. 5313(a). Under implementing regulations, a financial institution must file a currency transaction report for any cash transaction in excess of $10,000. Although Congress prescribed criminal penalties for anyone "willfully violating" the reporting requirements of the Act, 31 U.S.C. 5322, it initially did not provide a mechanism to prevent the evasion of the reporting requirements of Section 5313(a). In 1986, Congress filled that gap by enacting 31 U.S.C. 5324, which states that no person shall, "for the purpose of evading the reporting requirements" of Section 5313(a), cause a financial institution to fail to file a currency transaction report or to file a false report, or "structure or assist in structuring" a transaction with a financial institution.

B. Petitioners contend that a "willful" violation of Section 5324 requires proof that a defendant not only (A) knew of the reporting requirements and (B) acted with the intent to evade them, but also (C) knew that it was unlawful to do so. We believe—and ten courts of appeals have held—that a criminal violation of the anti-structuring provision of Section 5324 does not require proof of knowledge that purposeful structuring is prohibited.

As this Court has repeatedly held, the element of willfulness in a criminal statute requires proof of a purpose to do wrong or an evil motive to do that which the law condemns. Consistent with the general rule that ignorance of the law is no excuse, however, the willfulness requirement does not ordinarily require proof that the defendant knew that he was violating the law. Although the Court has in some contexts held that the element of willfulness requires proof of an intentional violation of a known legal duty, that requirement has been invoked only when it has been needed to ensure that the defendant has acted with the requisite wrongful purpose.

In the present context, a violation of the anti-structuring statute itself satisfies the "bad purpose" required for a willful violation because Section 5324 explicitly defines the wrongful purpose necessary to violate the law—a purpose to evade the reporting requirements of Section 5313(a). When a person acts with knowledge of the bank's reporting requirements and an intent to evade them, he has acted willfully by exhibiting the very purpose to do wrong that Section 5324 condemns. The jury instructions in this case made clear that the offense required proof of a "bad purpose": the court advised the jury that only a person having the deliberate intention to frustrate the reporting by the banks can be guilty of the offense of structuring.

C. The legislative history confirms that a willful violation of the anti-structuring statute does not require proof that the defendant was aware of the unlawfulness of purposeful structuring. Prior to 1986, the government sought to combat purposeful evasion of the reporting requirements by prosecuting structuring under the federal false-statement statute, 18 U.S.C. 1001, and the aiding-and-abetting statute, 18 U.S.C. 2(b). Some courts of appeals held that those provisions applied when a currency transaction re-

port would have been filed but for the fact that purposeful structuring concealed material facts from the bank. Under those cases, criminal liability attached when the defendant knew of the reporting requirements and acted with the purpose to evade them. See, *e.g.*, *United States* v. *Tobon-Builes*, 706 F.2d 1092 (11th Cir. 1983). At the same time, other courts of appeals concluded either that the Act and its implementing regulations did not impose a duty not to structure or that criminal liability was available only with respect to limited forms of structuring.

The legislative reports relating to the 1986 enactment of the anti-structuring statute make clear that Congress intended to adopt the approach of *Tobon-Builes* and reject the cases that conflicted with that decision. Because *Tobon-Builes* required knowledge of the reporting requirements and an intent to evade them—not knowledge that purposeful evasion of those requirements was unlawful—it is highly unlikely that Congress in 1986 intended to adopt the more stringent intent requirement advanced by petitioners here. That conclusion is reinforced, moreover, by Congress's 1992 amendment of Section 5324, which retained the anti-structuring language intact (and applied it to a new context) at a time when the courts of appeals had uniformly interpreted it not to require specific knowledge that structuring is unlawful.

D. Petitioners' arguments based on the language and structure of the anti-structuring statute are unpersuasive. Contrary to petitioners' contention, the fact that the "willfulness" requirement is found in Section 5322(a) does not mean that the elements set forth in Section 5324(3) do not constitute a willful offense. Section 5322(a) merely provides that a crim-

inal violation of subchapter II of Chapter 53 of Title 31 requires proof of willfulness. Unlike many of the other provisions of that subchapter, the anti-structuring provision of Section 5324(3) itself describes willful conduct and does not require an additional element to satisfy the willfulness requirement of Section 5322(a).

E. Because the language of the anti-structuring provision, the structure of the subchapter of Title 31 governing reporting requirements, and the legislative history all demonstrate that a criminal violation of the anti-structuring law does not require knowledge of unlawfulness, the rule of lenity does not apply. In addition, the interpretation advanced here does not raise constitutional doubts about the omission of a scienter requirement; a criminal violation of the anti-structuring statute requires knowledge of the reporting requirements and a purpose to evade them, which satisfies any constitutional scienter requirement.

ARGUMENT

THE ANTI-STRUCTURING STATUTE REQUIRED THE GOVERNMENT TO PROVE THAT PETITIONERS KNEW OF THE BANK REPORTING REQUIREMENTS AND ACTED TO EVADE THEM, NOT THAT THEY SPECIFICALLY KNEW THAT STRUCTURING IS UNLAWFUL

A. The Statutory Framework

In 1970, Congress enacted legislation designed to respond to the increased use of financial institutions by those engaged in criminal activity. See H.R. Rep. No. 975, 91st Cong., 2d Sess. 10 (1970); S. Rep. No. 1139, 91st Cong., 2d Sess. 2-4 (1970). The new legislation, the Currency and Foreign Transactions Reporting Act (Bank Secrecy Act), Pub. L. No. 91-508, Tit. II, 84 Stat. 1118, required financial institutions to maintain reports of transactions where such reports "have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings." 31 U.S.C. 5311; see *California Bankers Ass'n* v. *Shultz*, 416 U.S. 21, 37 (1974). To that end, Congress enacted a variety of reporting requirements pertaining to foreign and domestic financial transactions.

Of central relevance here is the provision governing domestic financial transactions. See Pub. L. No. 91-508, Tit. II, § 221, 84 Stat. 1122. As presently codified at 31 U.S.C. 5313(a), that provision requires that when a domestic financial institution engages in a currency transaction under circumstances prescribed by the Secretary of the Treasury, the financial institution or "any other participant in the transaction" must file a report in the manner prescribed by the Secretary. Although Section 5313(a) contemplates that a report may be required of any participant in the transaction, the Secretary's implementing regulations make the financial institution rather than the customer responsible for filing the report. See 31 C.F.R. 103.22(a). Under those regulations, a financial institution is required to report only unusually large cash transactions—any "deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution which involves a transaction in currency of more than $10,000." 31 C.F.R. 103.22(a)(1).[11]

As part of the 1970 legislation, Congress established an enforcement mechanism that includes criminal penalties for anyone "willfully violating" the Act's reporting requirements. 31 U.S.C. 5322; see Pub. L. No. 91-508, Tit. II, § 209, 84 Stat. 1121.[12] The criminal penalty section is a general provision applicable to violations of the subchapter of Title 31 that includes the currency transaction reporting requirements, and any violation of the regulations promulgated under that subchapter. 31 U.S.C. 5322(a).[13]

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[11] The regulations contain exemptions for large transactions in cash that occur in the ordinary course of business. See 31 C.F.R. 103.22(b). For example, a bank may exempt the deposits of retailers whose sales are "in substantial portions by currency" if those deposits do not exceed amounts "commensurate with the customary conduct of the lawful, domestic business of that customer." 31 C.F.R. 103.22(b)(2)(i) and (c).

[12] Congress has also authorized civil penalties in the case of willful violations of the reporting provisions. 31 U.S.C. 5321; see Pub. L. No. 91-508, Tit. II, § 207, 84 Stat. 1120.

[13] The criminal provisions of Section 5322(a) contain one exception; they do not apply to the reporting requirements for foreign currency transactions in 31 U.S.C. 5315.

Sixteen years later, Congress enacted the anti-structuring provision that is at issue here, 31 U.S.C. 5324, in order to fill a gap in the enforcement structure of the Act. See Money Laundering Control Act of 1986, Pub. L. No. 99-570, Tit. I, Subtit. H, § 1354(a), 100 Stat. 3207-22; see also H.R. Rep. No. 746, 99th Cong., 2d Sess. 18-19 (1986); S. Rep. No. 433, 99th Cong., 2d Sess. 22 (1986). Prior to that time, no statutory provision explicitly prohibited a person from causing a bank to fail to file a currency transaction report or structuring his financial transactions to evade the reporting requirements imposed under Section 5313(a).[14] To address that concern, Congress enacted 31 U.S.C. 5324, which provides that no person shall, "for the purpose of evading the reporting requirements" of 31 U.S.C. 5313(a), cause a financial institution to fail to file a currency transaction report or to file a false report, or "structure or assist in structuring" a transaction with a financial institution.

The narrow question in this case is whether "willfully violating" (31 U.S.C. 5322(a)) the anti-structuring provision in Section 5324 requires proof

[14] Structuring occurs when a person "conducts or attempts to conduct one or more transactions in currency, in any amount, at one or more financial institutions, on one or more days, in any manner, for the purpose of evading the reporting requirements." 31 C.F.R. 103.11(p). In its most common form, structuring entails "breaking down * * * a single sum of currency exceeding $10,000 into smaller sums" at or below $10,000 for the purpose of evading the reporting requirements under Section 5313(a). 31 C.F.R. 103.11(p). It also may involve conducting a currency transaction or series of transactions at or below $10,000 for the same purpose. *Ibid.*

that a defendant not only knew of the currency reporting requirements in Section 5313(a) and structured his transactions with the purpose to evade them, but also specifically knew that it was against the law to do so. We submit—and ten courts of appeals agree—that the requisite mental element is satisfied by proof that a defendant (1) knew of the reporting requirements for currency transactions in excess of $10,000 and (2) acted with the intent to evade them.[15] That conclusion is consistent not only with this Court's cases interpreting the "willfulness" requirement in other federal criminal statutes, but also with the basic principle of criminal law that ignorance of the law will not excuse its violation.

[15] Every court of appeals to address the issue, except the First Circuit, has agreed with the court below that the government need not prove knowledge of the prohibition against structuring in order to make out a criminal violation of the anti-structuring statute. See, *e.g.*, *United States* v. *Scanio*, 900 F.2d 485, 489-492 (2d Cir. 1990); *United States* v. *Shirk*, 981 F.2d 1382, 1389-1392 (3d Cir. 1992), petition for cert. pending, No. 92-1841; *United States* v. *Rogers*, 962 F.2d 342, 343-345 (4th Cir. 1992); *United States* v. *Beaumont*, 972 F.2d 91, 93-95 (5th Cir. 1992); *United States* v. *Baydoun*, 984 F.2d 175, 180 (6th Cir. 1993); *United States* v. *Jackson*, 983 F.2d 757, 767 (7th Cir. 1993); *United States* v. *Gibbons*, 968 F.2d 639, 643-645 (8th Cir. 1992); *United States* v. *Hoyland*, 914 F.2d 1125, 1128-1130 (9th Cir. 1990); *United States* v. *Dashney*, 937 F.2d 532, 537-540 (10th Cir.), cert. denied, 112 S. Ct. 402 (1991); *United States* v. *Brown*, 954 F.2d 1563, 1567-1569 (11th Cir.), cert. denied, 113 S. Ct. 284 (1992). Contra *United States* v. *Aversa*, 984 F.2d 493 (1st Cir. 1993) (en banc).

B. The "Willfulness" Requirement In This Context Does Not Justify A Departure From The General Rule That Ignorance Of The Law Does Not Excuse Criminal Conduct

This Court has observed that "willfully" is "a word of many meanings," and "its construction [is] often * * * influenced by its context." *Spies* v. *United States*, 317 U.S. 492, 497 (1943). When used in a criminal statute, however, "it generally means an act done with a bad purpose." *United States* v. *Murdock*, 290 U.S. 389, 394-395 (1933). See also *Felton* v. *United States*, 96 U.S. 699, 702 (1878) (the term "willfully" in "the ordinary sense in which it is used in statutes" means acting "with a bad purpose" or with "evil intent"). The requirement of a "bad purpose" means that more is required than simply "the doing of the act proscribed by the statute." *Screws* v. *United States*, 325 U.S. 91, 101 (1945) (plurality opinion). Instead, "[a]n evil motive to accomplish that which the statute condemns becomes a constituent element of the crime." *Ibid.* See also *Potter* v. *United States*, 155 U.S. 438, 446 (1894) (willful violation of statute prohibiting bankers from overdrawing checks requires a "purpose to evade or disobey the mandates of the law" and implies "knowledge and a purpose to do wrong"); *Spurr* v. *United States*, 174 U.S. 728, 734-735 (1899) (same).

While the term "willfully" normally requires proof that the defendant acted with knowledge of the pertinent facts and a bad purpose to do the unlawful act, it does not ordinarily require proof that the defendant knew his conduct violated the law—a principle sometimes summarized in the maxim that "ignorance of the law" is no excuse. *Cheek* v. *United States*, 498

U.S. 192, 199 (1991). See also *Lambert* v. *California*, 355 U.S. 225, 228 (1957); *Shevlin-Carpenter Co.* v. *Minnesota*, 218 U.S. 57, 68 (1910); *Barlow* v. *United States*, 32 U.S. (7 Pet.) 404, 410-412 (1833). That rule, of course, is "deeply rooted in the American legal system," and this Court has applied it "in numerous cases construing criminal statutes." *Cheek*, 498 U.S. at 199, citing *Hamling* v. *United States*, 418 U.S. 87, 119-124 (1974); *United States* v. *International Minerals & Chemical Corp.*, 402 U.S. 558, 562-565 (1971); and *Boyce Motor Lines, Inc.* v. *United States*, 342 U.S. 337, 342-343 (1952).[16]

On occasion, criminal statutes—including some requiring proof of "willfulness"—have been understood to require proof of an intentional violation of a known legal duty, *i.e.*, specific knowledge by the defendant that his conduct is unlawful. But where that construction has been adopted, it has been invoked only to ensure that the defendant acted with a wrong-

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[16] Consistent with that principle, the drafters of the Model Penal Code concluded that "[a] requirement that an offense be committed wilfully is satisfied if a person acts knowingly with respect to the material elements of the offense, unless a purpose to impose further requirements appears." Model Penal Code and Commentaries § 2.02(8), at 227 (Official Draft and Revised Comments 1985); accord, *e.g.*, *American Surety Co.* v. *Sullivan*, 7 F.2d 605, 606 (2d Cir. 1925) (L. Hand, J.) (the term "willful" in criminal statutes "means no more than that the person charged with the duty knows what he is doing," not that "he must suppose that he is breaking the law") (citing cases). The Model Penal Code's distillation of the willfulness requirement "follows many judicial decisions as well as legislation in a number of states." Model Penal Code and Commentaries, *supra*, § 2.02 comment 10, at 248 & nn.44-45 (citing authorities).

ful purpose. See *Liparota* v. *United States*, 471 U.S. 419, 426 (1985) (requiring proof of knowledge of regulations governing use of food stamps because, without such a requirement, the statute could punish "a broad range of apparently innocent conduct"); cf. *Lambert* v. *California*, 355 U.S. at 229 (requiring knowledge of city's registration requirement for newly arrived ex-felons as a constitutional matter, where "circumstances which might move one to inquire as to the necessity of registration [were] completely lacking").

Criminal tax cases are the primary example of the Court's occasional construction of the term "willfulness" to require knowledge of the law. Noting the special complexity of the tax laws, the Court has held that a defendant charged with a tax crime must be aware that his conduct is unlawful before he may be held criminally liable. See, *e.g.*, *Cheek*, 498 U.S. at 199-200; *United States* v. *Bishop*, 412 U.S. 346, 360-361 (1973).

Even in the tax cases, however, the Court has been careful to acknowledge the usual rule that knowledge of the law is not an element of proof in criminal cases, and to note that the construction of the term "willfully" in criminal tax statutes "carv[ed] out an exception to the traditional rule." *Cheek*, 498 U.S. at 200. The requirement of an "intentional violation of a known legal duty," the Court has explained, is merely a "refine[ment]," for the criminal tax context, of the general principle that "willfully" means acting with "a bad purpose" or "an evil motive." *Cheek*, 498 U.S. at 200, 201. See also *United States* v. *Pomponio*, 429 U.S. 10, 12

(1976) (per curiam); *United States* v. *Bishop*, 412 U.S. at 360.[17] Where the proof of a bad purpose is supplied in other ways, it is not necessary to require proof that the defendant was aware that the law specifically prohibited his conduct.

The anti-structuring statute, 31 U.S.C. 5324, satisfies the "bad purpose" component of willfulness by explicitly defining the wrongful purpose necessary to violate the law: it requires proof that the defendant acted with the purpose to evade the reporting requirement of Section 5313(a). The language of Section 5313(a) makes plain, and the legislative history confirms (H.R. Rep. No. 975, *supra*, at 10), that the purpose of the currency transaction reporting re-

[17] Petitioners argue (Pet. Br. 20 n.11, 25 n.17) that in *United States* v. *Pomponio*, *supra*, this Court rejected "bad purpose" as a component of "willfulness" not only for tax cases but for all other purposes as well. In *Pomponio*, the Court held that in the context of criminal tax statutes, the term "willfully" should be interpreted to mean "a voluntary, intentional violation of a known legal duty." 429 U.S. at 12. The Court made clear, however, that its construction of the term "willfully" was applicable only in the context of criminal tax statutes. See *ibid.* (referring to "the meaning of willfulness in [26 U.S.C.] § 7206 and related statutes," the meaning of willfulness "in this context," and the meaning of the word willfully "in these statutes"). *Pomponio* thus did not make a sweeping change in the Court's approach to the concept of "willfulness" in all contexts, but merely reaffirmed prior decisions indicating that in the criminal tax context the "bad purpose" generally required for proof of willfulness must be established by proof of an intentional violation of a known legal duty. Conversely, as we have noted, the Court has in some cases required proof of an intentional violation of a known legal duty in statutes that do not have a "willfulness" requirement. See, *e.g.*, *Liparota* v. *United States*, *supra*; *Lambert* v. *California*, *supra*.

quirements is to provide the government with information about individuals engaging in abnormally large currency transactions, which often are associated with criminal activity such as narcotics trafficking and tax evasion. Section 5324 does not contain its own reporting requirement, but enforces the reporting requirements of Section 5313(a) by specifically prohibiting the structuring of currency transactions "for purposes of evading the reporting requirements of [S]ection 5313(a)." Thus, if a person acts with knowledge of the reporting requirements and a specific intent to evade them, he has acted willfully because he has exhibited the "purpose to do wrong" (*Potter*, 155 U.S. at 446) that Section 5324 condemns.[18]

The jury instructions given in this case make that point clear. The court required the jury to find that petitioners "knowingly and willfully engaged in" structuring and that they did so "for the specific purpose of evading a reporting requirement that was

[18] Neither *Potter* v. *United States*, *supra*, nor *Screws* v. *United States*, *supra*, undermines this analysis. *Potter* construed the term "willfully" to require proof of "knowledge and a purpose to do wrong," but did not require specific awareness of the law prohibiting the conduct at issue. In *Potter*, the Court simply held that evidence of the defendant's good faith was admissible on the question whether the defendant had a "purpose to do wrong." 155 U.S. at 446-447. Likewise, the plurality in *Screws* construed the term "willfully" in the criminal civil rights statute to require proof of intent to deprive a victim of a right specifically recognized in the Constitution or decisions construing it. The Court did not, however, require proof that the defendant knew that the United States Code (or any other law) made that conduct a crime.

known by [petitioners] to exist." J.A. 29. The court then emphasized that point by adding: "Only a person who has deliberate intention to frustrate the reporting by the banks can be guilty of the offense of structuring." *Ibid.* Thus, in the context of structuring prosecutions, and in this case in particular, the "bad purpose" required by the element of willfulness comes from the "deliberate intention to frustrate" the banks' performance of their reporting duty—a duty of which petitioners were aware.

When a defendant employs an artifice for the specific purpose of depriving the government of information to which it is entitled, there is no basis for concluding that he is in some sense engaged in "innocent conduct." For that reason, this Court has never held, in cases involving the use of deceptive practices in relation to the government, that a "willfulness" requirement calls for proof that the defendant knew that his conduct was unlawful. In *Browder* v. *United States*, 312 U.S. 335, 341 (1941), for example, the Court held that the crime of "willfully and knowingly" using a passport secured by false statement simply required a use that was "deliberate[] and with knowledge and not something which is merely careless or negligent or inadvertent." The Court did not suggest that the defendant was required to know, in addition, that it was unlawful to use a falsely obtained passport.

In *United States* v. *Yermian*, 468 U.S. 63 (1984), the Court took a similar approach in construing the federal false-statement statute, 18 U.S.C. 1001, which holds criminally liable anyone who, "in any matter within the jurisdiction" of a federal agency, "knowingly and willfully" makes a false or fraudulent state-

ment. In *Yermian*, the Court held that a defendant could violate Section 1001 without knowing that his false statement pertained to a matter within the jurisdiction of a federal agency. 468 U.S. at 69-70. That conclusion necessarily indicates that the defendant did not have to know that his conduct was criminal.[19]

Petitioners argue (Br. 27-30) that even though they may have acted with intent to evade the known reporting requirements of Section 5313(a), they were not engaged in morally culpable conduct (and thus did not act willfully), because much of what Section 5324 refers to as "evasion" is in fact innocent conduct that is more properly referred to as "avoidance." But when a person is aware that a currency transaction reporting requirement will be triggered by an anticipated transaction, and he artificially restructures the transaction for the specific purpose of depriving the government of the information that Sec-

[19] Although the Court was influenced by the fact that the "knowing[] and willful[]" requirement followed, and therefore did not modify, the jurisdictional phrase (*Yermian*, 468 U.S. at 69), the decision is nonetheless pertinent here. If a "willfulness" requirement called for the intentional violation of a known legal duty, it would not matter where the jurisdictional element was situated; a defendant could not violate Section 1001 unless he knew that his conduct was unlawful, which would require knowledge of the federal interest. We note that because the government in *Yermian* did not object at trial to an instruction requiring the jury to find that the defendant "knew or should have known" that the matter was within the jurisdiction of a federal agency, the Court did not have occasion to decide whether such an instruction was improper. *Yermian*, 468 U.S. at 75 n.14. The Court did, however, make clear that actual knowledge of the jurisdictional fact was unnecessary.

tion 5313(a) is designed to obtain,[20] his conduct can hardly be equated with the kind of "apparently innocent conduct" (*Liparota*, 471 U.S. at 426) that has led this Court to require knowledge of the law as a precondition to conviction. Because "structuring is not the kind of activity that an ordinary person would engage in innocently," *United States* v. *Hoyland*, 914 F.2d 1125, 1129 (9th Cir. 1990), it is reasonable to hold a structurer responsible for evading the reporting requirements without the need to prove specific knowledge that such evasion is unlawful. See *United States* v. *Shirk*, 981 F.2d 1382, 1391 (3d Cir. 1992), petition for cert. pending, No. 92-1841; *United States* v. *Scanio*, 900 F.2d at 490; cf. *United States* v. *International Minerals & Chemical Corp.*, 402 U.S. at 565.

Petitioners make the separate argument (Br. 37-40) that the term "evading," as used in Section 5324, is too broad, apparently because it includes not only deceptive conduct that causes a bank not to file a report that it is required to file, but also conduct that results in the bank's not incurring a filing obligation at all—such as arranging deposits or withdrawals to avoid the $10,000 reporting threshold for a single day's transactions with a single institution. Evasion,

[20] Petitioners suggest that the government has no interest, under the statute or implementing regulations, in obtaining information about "structured" transactions, because the regulations require currency transaction reports only for cash transactions aggregating to more than $10,000 with a single bank on a single day. That, however, is not the limit of the government's regulatory interest in information about large cash transactions. The Treasury Department has directed banks to report to the IRS suspicious transactions that appear to involve purposeful structuring, such as the daily purchase of between $9,000 and $9,900 in cashier's checks by the same person. See 53 Fed. Reg. 40,064 (1988).

however, encompasses more than deceiving or inducing a bank into not complying with its reporting obligations. Arranging a series of transactions for the purpose of circumventing the currency reporting requirements constitutes evasion even if the effect of the scheme is to relieve the bank of any reporting responsibility. See 31 C.F.R. 103.11(p); 54 Fed. Reg. 3026 (1989).[21] Indeed, because a bank is not required to file a currency report unless it *knows* that a series of transactions amounting to more than $10,000 are related, see 31 C.F.R. 103.22(a)(1), even the commonplace device of "splitting up" deposits or withdrawals into accounts of less than $10,000 would not constitute "evasion" under a narrow definition of that term, because the defendant's conduct would prevent the bank from ever incurring an obligation to report the transaction. In light of the purpose of the statute to ensure that the government obtains information

[21] The structure of Section 5324 confirms that interpretation of "evasion." Section 5324(1) provides that no person shall "for the purpose evading the reporting requirements" cause a bank "to fail to file a report required under" Section 5313(a). If "evasion" were limited to circumstances in which a person deceives or induces a bank into not complying with reporting requirements that have actually been triggered, every instance of prohibited "evasion" would be covered by Section 5324(1). And Section 5324(3)—which prohibits the "structur[ing]" of currency transactions "for the purpose of evading the reporting requirements" of Section 5313(a)—would be superfluous. In addition, the legislative reports relating to the 1986 enactment of Section 5324 make clear that it "create[s] the offense of structuring a transaction to evade the reporting requirements, without regard to whether an individual transaction is, itself, reportable under the Bank Secrecy Act." S. Rep. No. 433, *supra*, at 22; H.R. Rep. No. 746, *supra*, at 19.

about large cash transactions, conduct that is specifically designed to deprive the government of that information is "evasion" and evinces a "bad purpose" sufficient to satisfy the willfulness requirement.[22]

In any event, petitioners' complaint about the unduly broad scope of the concept of evasion is misplaced, since they were clearly involved in evasion in even the narrowest sense of the term. Each of the substantive counts and each of the pertinent overt acts of the conspiracy count charged them with "splitting up" their cashier's check purchases from the same bank on the same day so that the bank would not make a report that it was legally required to make. In several instances when the bank officials recognized what petitioners were doing, they advised petitioners that they would have to file a report anyway, and upon being so advised, petitioners declined to complete the purchase. This is therefore a garden variety case of evasion, and there accordingly can be no doubt that the "bad purpose" generally required to satisfy the element of willfulness was present here.

[22] Petitioners complain (Br. 39) that defining the term "evasion" to include structuring transactions so that the bank will not incur a reporting obligation would put at risk legitimate businessmen with substantial cash receipts who choose to deposit those receipts frequently, rather than occasionally. That is not so. If a person conducts frequent cash transactions for legitimate business reasons—rather than to circumvent the currency transaction reporting requirements—the person is not engaged in "evasion." See *United States* v. *Brown*, 954 F.2d at 1571; S. Rep. No. 433, *supra*, at 22 ("A person conducting the same transactions for any other reasons * * * would not be subject to liability.").

C. The Legislative History Of Section 5324 Confirms That The Government Was Not Required To Prove That Petitioners Knew That Structuring Is Unlawful

1. The legislative history confirms that a willful violation of Section 5324 requires proof that the defendant knew of the reporting requirements and acted with the intent to evade them, but does not require proof that the defendant was aware of the anti-structuring law.

Prior to 1986 the currency reporting requirements included no explicit prohibition against structuring transactions to evade the reporting requirements. The government accordingly sought to combat the purposeful evasion of the reporting requirements using both 18 U.S.C. 1001, which prescribes criminal penalties for anyone who "knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact" in a matter within the jurisdiction of a federal agency; and 18 U.S.C. 2(b), which imposes criminal liability upon any person who "willfully causes an act to be done which if directly performed by him or another would be an offense" under federal law.

Some courts of appeals held that those provisions applied where a currency transaction report would have been filed but for the defendant's purposeful structuring, which concealed material facts from the bank. See, *e.g.*, *United States* v. *Tobon-Builes*, 706 F.2d 1092, 1096-1101 (11th Cir. 1983); *United States* v. *Heyman*, 794 F.2d 788, 790-793 (2d Cir.), cert. denied, 479 U.S. 989 (1986). As the leading case for that position explained, a defendant was criminally liable if he "knew about the currency reporting requirements and * * * purposely sought to prevent the financial institutions from filing required reports

* * * by structuring his transactions as multiple smaller transactions under $10,000." *Tobon-Builes*, 706 F.2d at 1101.

Other courts rejected the government's efforts to punish structuring under Sections 1001 and 2(b). Those courts found (1) that the Act and implementing regulations simply did not impose a duty not to structure, see, *e.g.*, *United States* v. *Varbel*, 780 F.2d 758, 760-763 (9th Cir. 1986); *United States* v. *Anzalone*, 766 F.2d 676, 679-683 (1st Cir. 1985); or (2) that criminal liability was confined to narrowly-limited forms of structuring, see, *e.g.*, *United States* v. *Denemark*, 779 F.2d 1559, 1561-1564 (11th Cir. 1986) (no liability under Section 1001 because defendant had no cash transaction over $10,000 with any one bank).

The Money Laundering Control Act of 1986 adopted the anti-structuring provision at issue here. Pub. L. No. 99-570, Tit. I, Subtit. H, § 1354(a), 100 Stat. 3207-22. The legislative reports relating to the 1986 enactment of Section 5324 indicated that Congress intended to codify *Tobon-Builes* and in effect overrule the contrary cases. As explained by the Senate Report accompanying a prior bill that incorporated what would become Section 5324:

> Subsection (h) [Section 5324] would codify *Tobon-Builes* and like cases and would negate the effect of *Anzalone*, *Varbel* and *Denemark*. It would expressly subject to potential liability a person who causes or attempts to cause a financial institution to fail to file a required report or who causes a financial institution to file a required report that contains material omissions or misstatements of fact. In addition, the proposed amendment would create the offense

> of structuring a transaction to evade the reporting requirements, without regard to whether an individual transaction is, itself, reportable under the Bank Secrecy Act.

S. Rep. No. 433, *supra*, at 22; see *id.* at 38 (anti-structuring language); see also H.R. Rep. No. 746, *supra*, at 18-19 & n.1 (favorably citing *Tobon-Builes* and explaining that the new provision "would resolve the legal issues raised by the various circuit courts" and "create the offense of structuring a transaction to evade the reporting requirements").

Tobon-Builes held that the defendant's willfulness was established by proof that he knew about the reporting requirements and structured his transactions with the intent to keep the financial institution from filing the required reports. 706 F.2d at 1101. The defendant was held accountable for structuring his transactions without regard to his knowledge of the illegality of his conduct. It is therefore significant that the legislative reports on the anti-structuring statute endorsed the approach of the *Tobon-Builes* decision. As one court of appeals explained, "[i]t is highly unlikely that in passing the anti-structuring law, and thereby providing even more notice than the defendant had in *Tobon-Builes*, Congress was somehow imposing an additional requirement that the defendant be aware of the illegality of his or her conduct." *United States* v. *Brown*, 954 F.2d 1563, 1569 (11th Cir.), cert. denied, 113 S. Ct. 284 (1992); accord, *e.g.*, *United States* v. *Scanio*, 900 F.2d at 491; *United States* v. *Shirk*, 981 F.2d at 1391.

The Senate Report also offered the following explanation of the intent required under the new structuring provision:

> [A] person who converts $18,000 in currency to cashier's checks by purchasing two $9,000 cashier's checks at two different banks or on two different days *with the specific intent that the participating bank or banks not be required to file Currency Transaction Reports for those transactions, would be subject to potential civil and criminal liability.* A person conducting the same transactions for any other reasons or a person splitting up an amount of currency that would not be reportable if the full amount were involved in a single transaction (for example, splitting $2,000 in currency into four transactions of $500 each), would not be subject to liability under the proposed amendment.

S. Rep. No. 433, *supra*, at 22 (emphasis added). Significantly, the only state-of-mind requirement mentioned is the "specific intent" to prevent a bank from filing currency transaction reports. Given the background rule that knowledge of the law is not an essential element of a criminal offense, the committee's reference to the requisite "specific intent"—without mentioning any requirement of knowledge of the anti-structuring law—confirms that there is no basis for engrafting that additional element onto the offense.[23]

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[23] Petitioners note (Br. 44) that there were proposals to replace the term "willfully" with the term "knowingly" in amending the Bank Secrecy Act. See H.R. Rep. No. 855, 99th Cong., 2d Sess. Pt. 1, at 7, 21-22 (1986); H.R. Rep. No. 746, *supra*, at 28-29, 41. They contend (Br. 44) that Congress's failure to change the state-of-mind requirement in the Act's remedial provisions ratified prior cases holding that a defendant must know of the reporting requirements in order to commit a willful violation of the Act. But that inference would not support petitioners; to the contrary, it

2. Congress's recent amendment of Section 5324 confirms the validity of the interpretation advanced here. On October 28, 1992, Congress enacted the Annunzio-Wylie Anti-Money Laundering Act. In pertinent part, that Act created a new anti-structuring provision for the reporting requirements under 31 U.S.C. 5316, which applies to international monetary instruments. See Pub. L. No. 102-550, Tit. XV, § 1525(a), 106 Stat. 4064-4065. Specifically, Congress amended Section 5324 by moving the anti-structuring provisions at issue here into a new subsection (a), and then creating a subsection (b), which prohibits structuring "for the purpose of evading the reporting requirements of section 5316." § 1525(a), 106 Stat. 4064-4065.

As this Court has explained, when Congress legislates with reference to an existing statute, it is presumed to be aware of the prevailing judicial interpretation of that statute. *Lorillard* v. *Pons*, 434 U.S. 575, 580 & n.7 (1978) (relying on uniform view of lower courts). When Congress amended Section 5324, every court to consider the issue had held that a willful violation of Section 5324(3) requires knowledge of the bank's reporting requirements and an intent to evade them. See, *e.g.*, *United States* v. *Scanio*, 900 F.2d at 491; *United States* v. *Rogers*, 962 F.2d 342, 343-345 (4th Cir. 1992); *United States* v. *Beaumont*, 972 F.2d 91, 93-95 (5th Cir. 1992); *United States* v. *Gibbons*, 968 F.2d 639, 643-645 (8th Cir. 1992); *United States* v. *Hoyland*, 914 F.2d at 1128-1130; *United States* v. *Dashney*, 937 F.2d 532, 537-540

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is entirely consistent with our submission that under the 1986 Act, a defendant must know of the reporting requirements before he can willfully violate them.

(10th Cir.), cert. denied, 112 S. Ct. 402 (1991); *United States* v. *Brown*, 954 F.2d at 1567-1569. No court had held that, in addition, the defendant must know that his action was unlawful.[24] Moreover, in the House Report accompanying a prior bill containing the pertinent provision, the committee noted:

> Under the new provision, codified as subsection (b) of section 5324, it would be illegal to structure the importation or exportation of monetary instruments with the intent to evade the * * * reporting requirement. As is the case presently for structuring cases involving currency transaction reports, the government would have to prove that the defendant knew of the * * * reporting requirement, but would not have to prove that the defendant knew that structuring itself had been made illegal. *United States* v. *Hoyland*, 903 F.2d 1288 (9th Cir. 1990).

H.R. Rep. No. 28, 102d Cong., 1st Sess. Pt. 1, at 45 (1991). Thus, a significant amendment of Section 5324 left intact (and replicated) statutory language that had been construed by federal courts in the manner indicated above. That course of action suggests that Congress intended to preserve the existing construction of the state-of-mind requirement of Section 5324. See *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 381-382 (1982); *Keene Corp.* v. *United States*, 113 S. Ct. 2035, 2043 (1993).

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[24] It was after the 1992 legislation had been enacted that the First Circuit held that a defendant must know or show reckless disregard for whether his actions were unlawful. See *United States* v. *Aversa*, *supra*.

D. Neither The Structure Of The Act Nor Other Analogous Statutes Indicate That The Anti-Structuring Statute Requires Proof Of Knowledge That Structuring Is Unlawful

1. Petitioners argue (Br. 9-12) that the expression "willfully violating this subchapter" in Section 5322(a) implies that there must be both "simple" violations and "willful" violations of the provisions of the subchapter, including Section 5324. The elements of Section 5324, standing alone, cannot make out willfulness, petitioners argue, because then there would be no difference between a simple violation of that statute and a willful violation.

The flaw in that argument is that it ignores not only the willful character of a violation of Section 5324, but also the generality of Section 5322(a). Section 5322(a) is a general provision that establishes a single standard of criminal liability—willfulness—for virtually all of the currency reporting provisions in subchapter II of Chapter 53 of Title 31. To conclude that one of several such provisions itself describes a "willful" offense does not make the "willfulness" requirement superfluous. In other words, the fact that criminal liability may not be imposed in the absence of willfulness does not mean that the mental state for each underlying offense to which Section 5322(a) applies must be less than willful.[25]

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[25] To illustrate, suppose the food stamp statute at issue in *Liparota* had prohibited a wide range of conduct including both the unauthorized receipt of food stamps and the use of food stamps to defraud the government. Suppose further that a general criminal provision of the statute made willful violations of any of those prohibitions a crime. The fact that the fraud provision already required proof of willfulness through proof of fraudulent intent would not mean that the term "willfulness" in the general criminal provision would have to be read to require something more than intent to defraud.

The same answer applies to petitioners' argument (Br. 12-14) based on the contrast between Section 5322(a), which penalizes "willful[] violat[ions]" of Section 5324, and 18 U.S.C. 981(a)(1)(A), which authorizes the civil forfeiture of property that is "involved in a transaction or attempted transaction *in violation of* section 5313(a) or 5324 of title 31."[26] (emphasis added). In contending that a "willful" violation of Section 5324 must require proof of more than a mere "violation," petitioners once again misapprehend the role of Section 5322(a) in the scheme of reporting provisions. Section 5322(a) requires proof of willfulness as a precondition for a Title 31 criminal prosecution, but that is not to say that a violation of Section 5324 (as referred to, for example, in Section 981) is not "willful." Conduct engaged in "for the purpose of evading" a known reporting requirement is willful conduct in the usual sense of that term, and the reference to willfulness in Section 5322(a) does not mean that Section 5324 must be read to describe a non-willful offense.[27]

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[26] In 1992, 18 U.S.C. 981 was amended in a way that is not material here. See Annunzio-Wylie Anti-Money Laundering Act, Pub. L. No. 102-550, Tit. XV, § 1525(c)(1), 106 Stat. 4065. For convenience, we refer to the version in effect when the court of appeals rendered its decision.

[27] Unlike Section 5322(a), one of the civil penalty provisions applicable to violations of subchapter II refers specifically to "willful[]" violations of Section 5324. See 31 U.S.C. 5321(a)(4)(A). That language, however, mirrors the language in the general civil penalty provision, 31 U.S.C. 5321(a)(1), and like that provision it appears to be designed

2. Petitioners also err in relying (Br. 14, 42) on this Court's cases interpreting "willfulness" as used in the remedial provisions of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, and the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.* This Court has determined that a "willful" violation of the ADEA or the FLSA requires proof that the employer knew or showed reckless disregard for whether his conduct was prohibited by the pertinent statute. See *Hazen Paper Co.* v. *Biggins*, 113 S. Ct. 1701, 1708 (1993) (ADEA); *McLaughlin* v. *Richland Shoe Co.*, 486 U.S. 128, 133 (1988) (statute of limitations governing the FLSA); *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 126 (1985) (ADEA). The Court observed that that standard was designed to give effect to the two-tiered system of liability in both Acts by differentiating between ordinary and willful violations. *Hazen Paper*, 113 S. Ct. at 1709; *McLaughlin*, 486 U.S. at 132; *Thurston*, 469 U.S. at 128. That reasoning, however, has no application to the remedial scheme at issue here, since Sections 5322(a) and 5324(3) together define a single offense of willful evasion of the reporting requirements of Section 5313(a).

3. Finally, petitioners claim (Br. 14-15) that the test adopted by the majority of the circuits under Section 5324(3) is inconsistent with the longstanding test for "willfulness" employed with respect to violations of other reporting provisions in the relevant

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simply to ensure that civil penalties will be imposed only upon a finding of willfulness. It does not suggest that Congress meant to require a more culpable mental state for civil and criminal penalties than the "purpose of evading" requirement that is found in Section 5324.

subchapter of Title 31. As concerns violations of the underlying reporting requirements, the courts of appeals have held that "willfulness" requires proof that the defendant had knowledge of the reporting requirements and an intent to violate them. See, *e.g.*, *United States* v. *Eisenstein*, 731 F.2d 1540, 1543 (11th Cir. 1984) (bank's willful violation of reporting requirements of Section 5313); *United States* v. *Bank of New England, N.A.*, 821 F.2d 844, 854-857 (1st Cir.) (willful violation of Section 5313 requires knowledge of reporting requirements, which may be shown by "flagrant indifference"), cert. denied, 484 U.S. 943 (1987); *United States* v. *Dichne*, 612 F.2d 632, 636 (2d Cir. 1979) (knowing importation or exportation of monetary instruments in excess of threshold dollar amount under predecessor to 31 U.S.C. 5316), cert. denied, 445 U.S. 928 (1980); *United States* v. *Granda*, 565 F.2d 922, 926 (5th Cir. 1978) (same).

Those decisions are not inconsistent with the decision below. To prove a structuring violation under Section 5324, the government is required to prove knowledge of the pertinent reporting requirement—just as the cases construing Sections 5313 and 5316 have required for willful violations of those provisions. Knowledge of the reporting obligation is required because the reporting statutes contain no element of evasion or deceit and potentially affect "a broad range of apparently innocent conduct," *Liparota* v. *United States*, 471 U.S. at 426. See *United States* v. *Shirk*, 981 F.2d at 1390-1391; *United States* v. *Scanio*, 900 F.2d at 491. Section 5324, by contrast, satisfies the "bad purpose" component of willfulness by requiring proof of an intent to evade the currency

reporting requirements. For that reason, Section 5324 does not contain the additional requirements of knowledge that structuring is unlawful.

The parallel statute to Section 5324 therefore is not the reporting provisions, such as Section 5313 and Section 5316. Instead, the parallel to Section 5324 (now codified at Section 5324(a)) is the recently enacted statute (now codified at Section 5324(b)) that makes structuring unlawful when it is done to evade the reporting requirements of Section 5316. As we have noted above, the legislative history of that new structuring statute is quite explicit in stating that it is not necessary for the government to prove that the defendant knew that structuring had been made illegal. That is precisely the same standard that was adopted by the court of appeals in this case and the other nine courts of appeals that have agreed with the analysis of the court below.

E. Petitioners' Interpretation Of The Statute Is Not Required By The Rule Of Lenity Or The Rule Requiring Avoidance Of Serious Constitutional Questions Where Possible

1. Petitioners argue (Br. 47-48) that the rule of lenity compels the acceptance of their reading of the anti-structuring offense. But as this Court recently reaffirmed, "that venerable rule is reserved for cases where, after seizing every thing from which aid can be derived, the Court is left with an ambiguous statute." *Smith* v. *United States*, 113 S. Ct. 2050, 2057 (1993) (internal quotation marks and brackets omitted). As we have shown, the language of the anti-structuring provision, the structure of the subchapter of Title 31 governing reporting requirements, and

the pertinent legislative history all demonstrate that a defendant must be aware of the reporting requirements and intend to evade them, but that he does not have to know that doing so is unlawful. The rule of lenity therefore does not come into play.

2. Contrary to petitioners' contention (Br. 32-33), it is unnecessary for this Court to embrace their interpretation of the statute to avoid the constitutional question whether Congress may validly omit a scienter requirement from the structuring offense. Compare, *e.g.*, *United States* v. *Freed*, 401 U.S. 601, 607-610 (1971) (no scienter required for registration of hand grenades), and *United States* v. *Dotterweich*, 320 U.S. 277, 284 (1943) (shipping misbranded drugs punishable without "consciousness of wrongdoing"), with *Lambert*, 355 U.S. at 229-230 (scienter required where convicted felons must register with the city five days after arrival). Under the interpretation advanced here, a criminal violation of the anti-structuring provision requires knowledge of the bank's reporting requirements and intent to evade them. The elements of the offense therefore include scienter, which satisfies any possible constitutional objection.[28]

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[28] Petitioners' vagueness concerns (Br. 33) are also misplaced. Due process requires "that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983). Because the anti-structuring provision requires a violator to know of the bank's reporting requirements and intend to evade them, the statute here easily satisfies the requirements of due process.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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No. 92-1196

In The

Supreme Court of the United States

October Term, 1993

WALDEMAR RATZLAF AND LORETTA RATZLAF,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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ARGUMENT IN REPLY

Treasury Department regulations, promulgated under 31 U.S.C. § 5313(a), require financial institutions to report currency transactions involving more than $10,000. The form is called a Currency Transaction Report, or "CTR." Section 5324 prohibits structuring currency transactions "for the purpose of evading" the CTR requirement. The petitioners, Waldemar and Loretta Ratzlaf, offer this Court four principal reasons, each independently sufficient, to hold that a bank customer cannot "willfully" violate the law against structuring unless the customer knows that such structuring is prohibited by law. The petitioners support their principal arguments by invoking several presumptions of statutory construction. The respondent's brief does not address many of these points, and those it does address it does not refute. This Court should hold that structuring currency transactions is not criminal unless committed with knowledge of the ban on structuring.

First, unless "willfulness" under 31 U.S.C. § 5322 – which converts a mere regulatory violation of 31 U.S.C. § 5324 into a serious felony – is construed to require knowledge of the law governing the defendant's conduct,[1] the element adds nothing to the requirements of

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[1] In its brief, the respondent occasionally lapses into confusion of this contention with the rather different proposition, which we do not advance, that the defendant to be guilty must know "that the United States Code (or any other law) made that conduct a crime." Resp. Br. at 26 n.18. Nowhere in our brief do we suggest that the defendant must know either where the law is codified, or that it is a criminal law.

the underlying statute. Pet. Br. 12-14. The respondent's brief concedes that this is so, Resp. Br. 17, 38-39, without even attempting to demonstrate, as required, that the petitioners' construction is not "possible." See *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) ("In construing a statute we are obliged to give effect, if possible, to every word Congress used."). For this reason alone, the judgment below can and should be reversed.

Second, the petitioners' interpretation of the statute is necessary to avoid the word "willfully," as used in section 5322, being assigned different meanings when attached to various different violations of Subchapter II of Chapter 53 of the Bank Secrecy Act of 1970. First, the respondent asserts that section 5322 "establishes a single standard of criminal liability – willfulness." Resp. Br. 38. But in fact the respondent proposes a construction under which that same word, taken from the same section, is required to mean two or more different things when incorporated by reference into each of several different provisions – "for the purpose of evading [the bank's] reporting requirement" as applied to a bank customer's section 5324 violation, but "intentionally violating one's own, known legal obligations" as applied to section 5313 violations by a financial institution or section 5316 violations by an international traveler. *See* Resp. Br. 40-42 (ignoring our anticipation and refutation of this argument; *see* Pet. Br. 30 n.22). The only definition of "willfully," as used in section 5322, that allows it to be employed consistently in all its applications is "with knowledge that one's acts are contrary to law."

Moreover, that is the definition that the courts had consistently applied to willfulness under section 5322

when Congress adopted that section as the criminal provision for the newly enacted section 5324 in 1986. Pet. Br. 14-18. "[W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." *Lorillard v. Pons*, 434 U.S. 575, 581 (1978). This reason alone is also enough to require reversal.

The petitioners' brief demonstrates additionally that criminal enforcement of section 5324 fits into a hierarchy of interrelated statutory remedies for improper dealings in cash, including forfeiture and money laundering provisions. Pet. Br. 40-44. Interpretation of these provisions *in pari materia*, see *Sullivan v. Everhart*, 494 U.S. 83, 92 (1990), and the position of 5322/5324 prosecutions in this statutory structure require adoption of a "knowledge of the law" *mens rea*. The respondent does not address this argument, *cf.* Resp. Br. 40, although it, too, would justify a ruling in petitioners' favor. See, *e.g.*, *Spies v. United States*, 317 U.S. 492, 495-97 (1943).

The petitioners buttress these four language- and structure-based statutory construction arguments with three strong presumptions. First, the petitioners rely on the notion that Congress does not ordinarily intend to create serious felony offenses that lack any element of morally blameworthy behavior. Pet. Br. 18-32. Second, the petitioners' construction of the statute avoids certain constitutional Due Process questions that would otherwise arise. Pet. Br. 32-33 (discussing validity of offense without true *scienter*, and vagueness). Finally, the rule of lenity

supports the petitioners' argument. Pet. Br. 47-48. The respondent's answers to these points amount to *ipse dixit*.

The respondent appears to concede that an offense requiring "willfulness" should be construed as calling for proof of blameworthiness (respondent calls this a "bad purpose" or "purpose to do wrong"), and that this element must sometimes be satisfied by proof of an intentional violation of a known legal duty. Resp. Br. 22-25. The respondent contends that a "bad purpose" is supplied here by section 5324's "purpose of evading the reporting requirements" imposed on banks by section 5313(a). Its argument in support of this notion depends on describing the "purpose of evading" element as if it required a showing by the prosecution of the defendant's employment of some "artifice" or "deceptive practices." Resp. Br. 27; see also *id.* at 41 ("evasion or deceit").[2] But

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[2] Elsewhere in its brief, however, the respondent retreats from this position, perhaps in order not to be seen as abandoning the Treasury Department's far broader regulatory definition, which does not require any true "evasion." Resp. Br. 29-30. But it does not explain how deliberately keeping out of government files information in which an agency has a "regulatory interest," Resp. Br. 29 n.20, but to which it has no legal entitlement, can legally be considered "bad." After all, the IRS has a "regulatory interest" in knowing everything about Americans' financial affairs; surely, the government is not suggesting that this Court hold there is a "duty" to tell the IRS any more than what the law requires to be revealed. The Treasury Department "direct[ion]" that banks report "suspicious transactions," invoked by the respondent, *id.*, is not mandatory and does not expand the bank's obligations under section 5313 or its implementing regulations. *See* Pet. Br. 29 n.20 (providing permanent C.F.R. citation of same advisory "BSA Treasury Ruling" for which respondent's footnote gives a Federal Register reference).

under neither the Treasury regulation's definition of "structure (structuring)," 31 C.F.R. § 103.11(p), Pet. Stat. App. 13-14, nor under the trial court's jury instructions here can any such limitation be found. The judgment cannot be affirmed on a theory not relied upon at trial. See *McCormick v. United States*, 500 U.S. ___, 111 S.Ct. 1807, 114 L.Ed.2d 307, 324 n.8 (1991); accord, *id.* at 336 (Stevens, J., dissenting). See also, *e.g.*, *Chiarella v. United States*, 445 U.S. 222, 235-36 (1980); *Dunn v. United States*, 442 U.S. 100, 106 (1979).[3]

Rather, as extensively discussed in the petitioners' brief, the concept of "evasion" in section 5324 apparently is viewed by the government in practice (as contrasted with the posturing of the respondent's brief) as meaning no more than "avoidance," and the concept of "structuring" as meaning (like "willfully," in the respondent's view) nothing at all. While we argue that "evading" should be understood more narrowly – that is, in its usual legal sense, Pet. Br. 37-40 – if "evading" means only "avoiding" (or "frustrat[ing]," as the trial court put it to the jury here) then the respondent's brief completely fails to explain how this constitutes any sort of "bad purpose" at all. *See also* note 2 *ante*.[4]

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[3] If this Court is inclined to adopt the respondent's new construction of "purpose to evade," requiring an element of artifice or deceit – which is similar to one point that we have advanced, *see* Pet. Br. 37-40 – then the regulation must be disapproved, and the judgment of conviction must be reversed and the case remanded for a new trial on such instructions.

[4] This case, in its present posture, is not about the sufficiency of the evidence but rather about the proper definition of the elements of the offense. Nor does the respondent seem to

The respondent's brief also dismisses too lightly the constitutional issues that can be avoided by adopting the petitioners' position. Resp. Br. 43.[5] Because, as just elaborated, the anti-structuring law, even as the government now would construe it, contains no genuine element of blameworthiness (or "bad purpose"), but only an intent to avoid implicating certain governmental regulations, the question does arise whether the due process clause permits severe punishment of such conduct (even if engaged in "knowingly"). See *Posters 'n' Things, Ltd. v. United States*, No. 92-903, in which just that sort of issue is presented this Term. The kind of *scienter* that we suggest

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argue that error in the definition of the *mens rea* element could somehow have been harmless in this case. Thus, it is puzzling to contemplate what point the respondent's brief is trying to make when it strays into a discussion of whether the Ratzlafs themselves "were clearly involved in evasion in even the narrowest sense of the term." Resp. Br. 31. (The same comment would apply to the respondent's immaterial elaboration of the "facts" of the case (*id.* at 5-7), which focuses on the motive evidence and "background" adduced at trial. The issue here is not whether the petitioners intended to keep information of their cash transactions away from the IRS; that is undisputed. The question is whether their ignorance that this might be unlawful protects them from conviction under the statute at issue here.) In any event, the "instances" referred to by the government as demonstrating "a garden variety case of evasion" are not the transactions for which the petitioners were charged and convicted. In the two instances underlying these convictions, no information was withheld from the bank. *See* Pet. Br. 5-6; Resp. Br. 8-9.

[5] The respondent seeks to avoid application of the rule of lenity by asserting that there is no ambiguity in this statute's use of the words "willfully violating this subchapter." Resp. Br. 42-43. The fundamental ambiguity in this phrase, out of which this case arises, is identified in Pet. Br. at 11.

is necessary to satisfy due process, outside the realm of inherently dangerous or highly regulated activities, is knowledge of the facts that make the conduct "blameworthy" (or "bad"), not merely knowledge of *any* facts. *Cf. Staples v. United States*, No. 92-1441 (also presenting such an issue of statutory construction for decision this Term).

The respondent relies heavily on an extensive but attenuated reading of the legislative history of the 1986 Act to support its analysis. Resp. Br. 32-35. As we already have shown, Pet. Br. 44-47, those materials do not discuss the incorporation of 31 U.S.C. § 5322 as the criminal enforcement provision for the new anti-structuring law. Thus, that history falls far short of demonstrating a Congressional intent to reject that section's settled construction and instead leave the term "willfully" without any significance despite its role in elevating a regulatory violation into a felony.

Finally, the respondent turns to "subsequent legislative history" to bolster its argument, relying on a line in a committee report on a 1991 bill containing a provision that was ultimately included in the 1992 Annunzio-Wylie Anti-Money Laundering Act. Resp. Br. 36-37. This Court has never given such arguments much weight. See, *e.g.*, *Sullivan v. Finkelstein*, 496 U.S. 617, 628 n.8 (1990). The 1992 amendment had nothing to do with Congressional consideration or reconsideration of the *mens rea* element of this or any other offense, but merely added a new subsection to section 5324. The report which the respondent quotes is thus that of a different committee of (one House of) a different Congress, concerning a different bill from that enacted in 1970 or in 1986 (or even in 1992, for that matter).

No Member of Congress, much less the Congress as a whole, was ever called upon to vote on whether that part of the report was accurate, since it did not interpret any part of the law then proposed to be enacted. The respondent's reliance on the line quoted from the 1991 report is no more than an attempt to "smuggle into judicial consideration," *Finkelstein, supra,* 496 U.S. at 631 (Scalia, J., concurring), under the guise of "legislative history," the government's litigation position on the very issue now before this Court. "Arguments based on subsequent legislative history, like arguments based on antecedent futurity, should not be taken seriously, not even in a footnote." *Id.* at 632. The Court should therefore dismiss entirely the respondent's argument attempting to interpret section 5322, as enacted in 1970 and adopted in 1986, on the basis of a committee report filed in 1991 with respect to a proposed amendment to section 5324.

A few simple, not-so-hypothetical cases[6] illustrates the unfairness and implausibility of the government's theory. Imagine a person whose legitimate business generates substantial cash receipts, and who declares every penny, every year, on a properly filed income tax return. This person, however, knows of the CTR requirement, and knows that the IRS takes a "regulatory interest," Resp. Br. 29 n.20, in cash transactions at financial institutions involving more than $10,000, because the agency believes them to be suspicious and to suggest fertile ground to plow for evidence of tax evasion at least, if not

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[6] See, for example, the actual facts of *United States v. Aversa,* 984 F.2d 493 (1st Cir. 1993) (in banc), or of *United States v. Shirk,* 981 F.2d 1382 (3d Cir. 1992), *cert. pending,* No. 92-1841.

of other illegal activities. Our subject has no desire to deal with unnecessary IRS audits or to fend off the inquiries of suspicious government agents. A business decision is therefore made, precisely for the purpose of seeing that no CTR is ever filed, that the business will send cash to the bank whenever the till or safe accumulates nearly $10,000, even if this means increasing the number of trips to the bank each week, or even each day. Another business person, for the same reason, decides to open the company's operating account in one bank and the payroll account in another. Further assume that neither knows there is a law prohibiting "structuring."

Or, to recap the pertinent facts of the petitioners' case (Counts Four and Five), the bank customer, knowing generally of the CTR requirement and wishing no report to be made, asks a bank official whether a report needs to be filed if a single sum of currency is used to purchase a cashier's check for more than $10,000. Told that it does, the customer asks if this is so when two checks of less than $10,000 each are purchased by two customers from that same single sum of currency. On the banker's (mistaken) assurance that no report need then be filed, and not knowing of the ban on structuring, the customer and her companion buy two cashier's checks for $9500 each.

The respondent's construction of 31 U.S.C. §§ 5322 and 5324 calls each of these actions "evasion" and declares all of them to have a criminally "bad purpose." Must Congress be deemed to have intended such conduct, engaged in for this reason, to be punished as a serious felony offense? The analyses of the unanimous, *in banc* First Circuit in *Aversa, supra,* of Judge Kozinski in *Caldwell, see* Pet. Br. 27-28, and of this Court in *United*

States v. Isham, 17 Wall. (84 U.S.) 496 (1873) (*see* Pet. Br. 37-39), compel the answer No. The judgment of the Ninth Circuit must be reversed.

CONCLUSION

For each of the foregoing reasons, and for the reasons more fully elaborated in their opening brief, petitioners Waldemar and Loretta Ratzlaf pray that this Court reverse the judgment of the United States Court of Appeals for the Ninth Circuit affirming their convictions and sentences, and direct the court of appeals to remand for a new trial.

Respectfully submitted,

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(5)

No. 92-1196

In The

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October Term, 1993

WALDEMAR RATZLAF AND LORETTA RATZLAF,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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STATEMENT OF INTEREST OF THE AMICUS CURIAE

The National Association of Criminal Defense Lawyers (hereinafter "NACDL") is a District of Columbia non-profit corporation, with membership comprised of more than 7500 lawyers and 28,000 affiliate members who are citizens of every state. Members serve in positions bringing them into daily contact with the criminal justice system as advocates or law professors. The American Bar Association recognizes the NACDL as an affiliated organization and awards it full representation in the ABA House of Delegates. The NACDL is dedicated to the preservation and improvement of our adversary system of justice.

Among NACDL's stated objectives is the promotion of the proper administration of criminal justice. Consequently, NACDL is concerned with the protection of individual rights and the improvement of the criminal law, its practices and procedures. A cornerstone of the criminal justice system is the essential role that the intent elements of a crime (including on occasion a "knowledge of the law" element) play in insuring that a statute does not reach innocent conduct. Beyond the particulars of the statute at issue here, NACDL is very concerned about any decision that would have broader implications regarding "ignorance of the law" and similar defenses, especially in regulatory crimes.

The *Amicus Curiae* Committee of the NACDL has discussed this case and decided that this issue is of such importance to defense lawyers and criminal defendants throughout the nation that the NACDL should offer its assistance to the Court. Both Petitioners and Respondent

have consented to NACDL's participation as *Amicus Curiae*. Letters of consent accompany the briefs filed with this Court.

ARGUMENT

I. INTRODUCTION

This case presents important issues pertaining to the mental elements of regulatory offenses. When previously legal activity is deemed a felony, what must the government prove regarding the defendant's state of mind? In particular the problem arises where, as here, the prohibited act is not inherently blameworthy. In such circumstances, may one be imprisoned for engaging in what he reasonably believes to be lawful and legitimate behavior, or must the government prove some state of mind, either knowledge or recklessness, regarding the fact of prohibition?

Amicus submits this brief because of the significant misunderstanding surrounding both the term "willful" and the concept of an "ignorance of the law" defense. "No area of the substantive criminal law has traditionally been surrounded by more confusion than that of ignorance or mistake of fact or law." 1 Wayne R. LaFave & Austin W. Scott, *Substantive Criminal Law* (1986), § 5.1 at 575.

We anticipate that the points raised in our brief actually should be unnecessary to the resolution of this case. Petitioners' discussion of the structure of the statute should conclusively resolve the matter: the need to impart to the word "willfully" in 31 U.S.C. § 5322 a single meaning, the same for violations of § 5324(3) as it has for violations of §§ 5316 and 5313, requires reversal of the court below. So too does the fact that § 5322 criminalizes

only "willfully violating" § 5324(3), therefore requiring some mental element beyond those involved in a mere violation of § 5324(3) (which is all the court below required).

Given these clear directives from the structure of the statute, there is no reason to undertake a broad-ranging exploration of the term "willful," with its various meanings in various federal criminal statutes. However, should this Court choose to engage in such an analysis, it will come to the same conclusion: the decision below must be reversed.

As is widely quoted, willful "is a word of many meanings, its construction often being influenced by its context." *Spies v. United States*, 317 U.S. 492, 497 (1943). Nevertheless, there are some underlying principles that can be extracted from the cases. These principles lead to the same clear result as the structure of the statute: a willful violation of § 5324(3) requires some mental element regarding the law's requirements, which as to § 5324(3) means the prohibition on structuring.

The *Scanio*[1] courts state that " 'willful' generally 'means no more than that the person charged with the duty knows what he is doing.' " *United States v. Scanio*, 900 F.2d 485, 489 (2d Cir. 1990) (quoting *American Surety v. Sullivan*, 7 F.2d 605, 606 (2d Cir. 1925)). In contrast to

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[1] For simplicity *amicus* will refer to "the *Scanio* cases" or "the *Scanio* courts" when referring generically to the decisions holding that a conviction under §§ 5322 and 5324(3) involves no mental element regarding the prohibition on structuring, after *United States v. Scanio*, 900 F.2d 485 (2d Cir. 1990). *Scanio* was the first appellate decision to so hold, and its analysis has been relied upon heavily by many of the subsequent decisions, including that of the court below.

the *Scanio* cases' generalization is a recent pronouncement from this Court on the meaning of "willful." *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985). The lower court had stated that a violation was willful if the individual "knew or showed reckless disregard for the matter of whether [his] conduct was prohibited . . . " In short, it required far more than that the act be done intentionally; it required that the defendant act knowingly or recklessly as to the law's requirements.

This Court observed in *Thurston* that the lower court's definition "is consistent with the manner in which this Court has interpreted the term in other criminal and civil statutes," and further noted that the definition "has been applied by courts interpreting numerous other criminal and civil statutes." 469 U.S. at 624 and n. 20. *Accord, United States v. Bank of New England*, 821 F.2d 844 (1st Cir.), *cert. denied*, 484 U.S. 943 (1987) ("the Supreme Court has endorsed defining willfulness, in both civil and criminal contexts, as 'a disregard for the governing statute and an indifference to its requirements.' ") (quoting *Thurston*.) The *Thurston* standard was applied by the First Circuit to §§ 5322 and 5324(3). *United States v. Aversa*, 984 F.2d 493, 500-501 (1st Cir. 1993) (*en banc*).

In fact, until recently the most often used jury instructions included an ignorance of the law element for all major crimes. Edward J. Devitt and Charles B. Blackmar, *Federal Jury Practice and Instructions* (1977), § 14.03 (serious crimes require proof that defendant knowingly did an act the law forbids, purposely intending to violate the law). That was especially the case whenever "willfulness" was an element of the crime. *Id.* at § 14.06 (act is done willfully if done with specific intent to do something the law forbids and with bad purpose either to

disobey or disregard the law.)[2] *Accord, Eleventh Circuit Pattern Jury Instructions, Criminal Cases*, § 9.1 (1985).

In recent years, there has been a rejection of the loose concept "specific intent" and a move toward the Model Penal Code approach of defining specific mental states for each element of the crime. *United States v. Bailey*, 444 U.S. 394, 403-406 (1980). The problem is that some courts, in reacting against the vagueness of "specific intent," have ignored the fact that for many statutes, particularly regulatory ones, one element of the crime does indeed involve some mental state regarding the law's provisions.[3]

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[2] Many cases have held that a "bad purpose" instruction need not be given, but have still recognized that an element of the crime was knowledge of the law's provisions. *United States v. Pomponio*, 429 U.S. 10, 12 (1976); *United States v. Moylan*, 417 F.2d 1002 (4th Cir. 1969), *cert. denied*, 397 U.S. 910 (1970) (prosecution for willful destruction of government property does not require proof of "bad purpose" but does require knowledge that defendant is breaching statute.) The court below must be reversed so long as this Court finds any mental element regarding the ban on structuring; "bad purpose" is not the issue.

[3] The use of the word "willfully," as opposed to "knowingly" or no modifier at all, has frequently been seen to evidence Congress's intent to require knowledge of the law's requirements. *See, e.g., United States v. Flores*, 735 F.2d 1499 (9th Cir. 1985) ("[T]he absence of words such as 'intent' and 'willfully,' which traditionally accompany specific intent crimes, supports our conclusion [that conviction under Federal Gun Control Act does not require proof of knowledge of duty to notify carrier before shipping firearms]"); *United States v. Sirhan*, 504 F.2d 818, 820 n. 3 (9th Cir. 1974) (discussing different jury instructions for "willful," as opposed to "knowing," crimes).

We could probably quote scores of cases summarizing the meaning of "willful" in criminal statutes, applying similar (or stricter) definitions to that in *Thurston*.[4] We know that the government could likewise cite scores of cases claiming that "willfully" generally means only "knowingly." Rather than relying on how some decisions generalize about the state of the law, it is probably more useful to look instead at the actual statutes, to see how "willful" is in fact applied in criminal law.

The broad range of statutes in which "willful" has been held to require some mental element as to the law's requirements, either actual knowledge or at least reckless disregard, refutes the *Scanio* cases' generalization – the element we submit is part of the crime of structuring is hardly a rarity in criminal statutes. The principles extractable from the cases show that, even though certainly in some statutes "willful" means only "intentional," § 5322 is not among them, whether applied to violations of

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[4] Several courts have confronted the issue of whether willfulness can be satisfied by a "reckless disregard" standard or whether, instead, a more exacting test such as "intentional violation of a known legal duty" is required. *See, e.g., United States v. Budzanosky*, 462 F.2d 443, 452 (3d Cir.), *cert. denied*, 409 U.S. 949 (1972). Although some courts have stated that they were rejecting an "ignorance of the law" defense, in fact they were still requiring some mental state as to the statutory prohibition, namely, recklessness. The court below held that there was no mental element required as to the prohibition on structuring, while the First Circuit *en banc* applied the "reckless disregard" standard to structuring violations. *Amicus* submits that the knowing violation standard is appropriate, to maintain consistency with the standard applied to the term "willful" in § 5322 for violations of § 5316 and other provisions of the Subchapter. However, either standard would require reversal of the court below.

§§ 5316 and 5313, or to § 5324(3). Thus, even absent the structure of the statutes, as detailed in Petitioners' brief, the only proper conclusion is that the court below erred. When combined with Petitioners' linguistic and structural analysis, the conclusion is simply inescapable that the crime of structuring requires some mental element regarding the prohibition on structuring.

II. BECAUSE STRUCTURING DEPOSITS TO TAKE ADVANTAGE OF THE $10,000 REGULATORY THRESHOLD IS NOT INHERENTLY BLAMEWORTHY, "WILLFULNESS" REQUIRES KNOWLEDGE THAT STRUCTURING IS PROHIBITED

A. WHERE THE ACTS CRIMINALIZED BY A STATUTE DO NOT INVOLVE INHERENTLY BLAMEWORTHY CONDUCT, THE TERM "WILLFULLY" REQUIRES PROOF OF KNOWLEDGE OF THE LAW'S REQUIREMENTS

In assessing what "willful" means in a particular statute, the courts have most frequently looked to whether the statute encompassed behavior that could be considered "innocent," absent knowledge of the law's provisions. For example, in *United States v. Lizarraga-Lizarraga*, 541 F.2d 826 (9th Cir. 1976), the court defined "willful" under 22 U.S.C. § 1934, pertaining to prohibitions on export of ammunition and arms. That statute, like § 5322, prohibited willfully violating any provisions of the relevant law. The court concluded that conviction requires proof that the defendant knew of the prohibition on export. In doing so, the court looked to the "exhaustive list of items" covered by the prohibition, many of which "might be exported or imported innocently."

> Under such circumstances, it appears likely that Congress would have wanted to require a voluntary, intentional violation of a known legal duty not to export such items before predicating criminal liability.

541 F.2d at 828.[5] Even some of the *Scanio* cases recognize this principle, although, as discussed below, they reach the wrong conclusion about the innocence of the behavior at issue here. *See, e.g., United States v. Dashney*, 937 F.2d 532 (10th Cir.), *cert. denied*, 112 S.Ct. 402 (1991) ("When typically innocent behavior is criminalized, there is a strong argument for requiring a person to have knowledge of the illegality of his actions to justify a conviction.")

The need for such a mental element, as a protection against criminalizing innocent conduct, has grown dramatically in recent years. This Court need not enter into the policy debate regarding the extent to which life and business in this country have become subject to pervasive governmental regulation; it need only acknowledge the obvious fact. And much of this regulation, while presumably necessary for protecting society from various evils, touches upon behavior that is not normally regarded as blameworthy.

Other courts have adopted a similar approach. If the court found that the conduct was "innocent" absent knowledge of its illegality, it interpreted the statute to require such knowledge, sometimes even absent the term

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[5] Other circuits have reached the same conclusion about § 1934 or its recodification at 22 U.S.C. § 2778(c). *See, e.g., United States v. Golitschek*, 808 F.2d 195, 203 (2d Cir. 1986); *United States v. Adames*, 878 F.2d 1374, 1377 (11th Cir. 1989); *United States v. Davis*, 583 F.2d 190, 193 (5th Cir. 1978).

"willfully" appearing in the statute. *See, e.g., Liparota v. United States*, 471 U.S. 419 (1985). Conversely, if the court determined that the conduct was not "otherwise innocent," it was less likely to find knowledge of the law to be an element of the crime. *See, e.g., United States v. Budzanosky*, 462 F.2d 443, 452 (3d Cir.), *cert. denied*, 409 U.S. 949 (1972) (prosecution for willfully falsifying labor union records under 29 U.S.C. § 439; court finds that imposing a lower mental state "will not operate as a trap for the unwary" because the prohibited acts are inherently deceptive practices).[6]

This "otherwise-innocent" analysis does not look to whether *all* behavior encompassed by the statute might be considered innocent. Instead, the question is whether *some* of the proscribed conduct meets that test. For example, in *Liparota*, this Court concluded that conviction under 7 U.S.C. § 2024(b), unauthorized use of food stamps, required proof of knowledge regarding what the law authorized. A significant underpinning to that conclusion was the recognition that the statute encompassed a broad range of innocent conduct. 471 U.S. at 427. But the facts in *Liparota* involved a shop-owner purchasing food stamps from undercover agents for substantially less than their face value, fairly clear evidence of fraud. *Id.* at 421. And certainly most people prosecuted under 7 U.S.C. § 2024(b) for food stamp violations would never have thought their actions were authorized by law. Nevertheless, in determining that the statute reached innocent

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[6] Notably, although the *Budzanosky* court relied on the inherent wrongfulness of the crime in rejecting a higher *mens rea*, it still found that "willfulness" entailed a reckless disregard of the law, the standard applied in *Aversa*.

behavior, this Court looked to the broad range of conduct that *could* be prosecuted if it held otherwise.

The lower courts have applied the same approach. For example, in *Lizarraga*, some of the proscribed items would obviously be subject to regulation. In fact, the defendant in that case was carrying ammunition secreted in various compartments of his truck, strongly suggesting that at the least he knew his acts were wrong. But these facts did not undo the risk that the statute encompassed some innocent behavior, at least as to other defendants. This led the court to the conclusion that "willfulness" entailed knowledge of the prohibition. Thus, the question before this Court is not whether the Ratzlafs or some other particular defendants were engaged in innocent conduct. Instead, this Court should determine whether some of the behavior § 5324(3) encompasses is innocent, absent knowledge of the prohibition.

B. ORGANIZING THE SIZE OF ONE'S BANK DEPOSITS, WITH THE KNOWLEDGE THAT THE SIZE OF THE DEPOSIT MAY ELIMINATE A REQUIREMENT OF REPORTING THE DEPOSIT TO THE GOVERNMENT, AND WITH THE INTENT TO TAKE ADVANTAGE OF THAT THRESHOLD REQUIREMENT, IS NOT BLAMEWORTHY CONDUCT

Many of the *Scanio* line of cases have considered the "otherwise innocent" argument and rejected it, on the grounds that structuring is not "innocent" activity, regardless of whether the individual knows of the ban on structuring. *Dashney*, 937 F.2d at 539 ("[I]n the context of the statutes before us, no wholly innocent person faces

such a predicament since a scienter element is incorporated into both 31 U.S.C. §§ 5324 and 5322.")[7] To explore these courts' proclamation that it is "non-innocent" to attempt to avoid the reporting requirement, we must first discern what they mean. Unfortunately, many of the opinions have not been terribly explicit. Three assertions regarding structuring's "non-innocence" are implied or stated: 1) those who structure are non-innocent because they are involved in other criminal activity; 2) in general, it is non-innocent to attempt to circumvent requirements of the law; and 3) in particular, it is non-innocent to attempt to deny the government information. All of these contentions are incorrect.

1. The Desire To Avoid Filing A CTR Can Be Motivated By Innocent Purposes And Does Not Necessarily Reflect Other Criminal Activity

No opinion has explicitly stated that all structurers are involved in other criminal activity, although one commentator has. Welling, *Smurfs, Money Laundering, and the Federal Criminal Law: The Crime of Structuring*, 41 Fla. L. Rev. 286 (1989).[8] However, it would seem that this proposition implicitly underlies the *Scanio* courts' decisions,

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[7] This comment ironically highlights the point that *Dashney*, like the other *Scanio* cases, actually ignores the different scienter elements incorporated into § 5322 and § 5324(3). Those cases only require the "intent to evade" element of § 5324(3), without also applying the additional, "willfully" element of § 5322.

[8] "[N]o legitimate reason exists to resist reporting large cash transactions," *id.* at 310; "[T]he only reason to avoid the reporting law is to hide other crime," *id.* at 314; and "Smurfing arises only in the wake of an effort to evade another law." *Id.* at 317.

which might explain their strained reading of the statutory language, in which they ignore the differing meanings they impose on § 5322's "willfully" and likewise ignore how they render that term redundant. If those courts in fact believed as Welling does, they were wrong. As other courts have recognized, that is simply not the case: there are non-criminal reasons for structuring.

For example, in *United States v. Dollar Bank Money Market Account*, 980 F.2d 233 (3d Cir. 1992), a forfeiture case under § 5324(3), it was undisputed that the funds were a widow's "cash horde" of legitimately derived funds. 980 F.2d at 233. The funds were given to her nephews, who intended to pay her expenses as her health declined. 980 F.2d at 235. The case involved "legitimate money earned by hard working people rather than criminals stashing profits from an illegal enterprise." 980 F.2d at 242 (Greenberg, J. dissenting from holding that § 5324(3) requires knowledge that reporting requirement is a legal requirement, rather than bank policy, but acknowledging "obvious humanity" of majority's position, given legitimacy of funds deposited).

In response to a summary judgment motion, the claimant alleged that his reason for structuring was to maintain his aunt's privacy regarding the funds, to maintain his own privacy, and to avoid the danger that "if news were publicized that an eccentric old woman hid hundreds of thousands of dollars in her house, some people would attempt to burglarize it." 980 F.2d at 241. His explanations were characterized as "legitimate," and his need for privacy was deemed "credible" by the court, which noted that the aunt's home was in a deteriorating neighborhood. *Id.* The claimant received legal advice to

the effect that structuring was a lawful means of accommodating these privacy interests.

Although the government apparently only resorted to forfeiture and not a criminal prosecution in *Dollar Bank*, a ruling by this Court in the government's favor would certainly allow prosecutions under such facts. The aunt and claimant in *Dollar Bank* are hardly unique in their wish to maintain financial privacy, not out of a desire to hide criminal activity, but for legitimate reasons. Some may act simply out of personal beliefs that their financial holdings (as opposed to their taxable income) are no one's business, others out of concern that disclosure of their finances could lead to burglary or similar problems. The reported decisions reveal other examples of "innocent" structuring; how many thousands more are there which are unreported because the government is unaware of them or, as an exercise of prosecutorial discretion, has chosen not to indict?

The district court opinion that led to the First Circuit's *en banc* decision in *Aversa*, *United States v. Aversa*, 762 F. Supp. 441, 448 (D.N.H. 1991), likewise involved defendants whose activities were "innocent," but for the prohibition of which they were unaware:

> One thing that is perfectly clear to the court is that this is a case that was never contemplated by the drafters of the statute and is a case that never should have been brought by the United States Attorney. There are enough drug dealers and racketeers out there that are legitimate targets of this statute; the United States Attorney should not be wasting the government's time and money charging a man the government admits was not involved in drugs and not laundering ill-gotten gains and not keeping any information from the United States.

See also United States v. Baydoun, 984 F.2d 175, 182 (6th Cir. 1993) (government concedes that cash was nontaxable and that drug monies were not involved; court finds it "clear that there was no attempt by defendant Baydoun to engage in money laundering or to evade taxes due the IRS").

Welling, contrary to her blanket assertion that all structuring is related to criminal activity, appears to acknowledge the existence of, and perhaps even the legitimacy of, privacy-motivated structuring, Welling, 41 Fla. L. Rev. at 310 and 314. Welling then argues that the government's need to know about cash deposits outweighs these individuals' privacy interests. *Id.* at 310. We do not dispute Congress's authority to make that determination. But that point only establishes that a law barring structuring is valid, a point not at issue in this case. It does not at all support the conclusion that all structuring is inherently non-innocent, such that Congress would have intended to incarcerate even those who structure in the mistaken believe that it is a legitimate and legal means of maintaining their privacy.

2. The Mere Desire To Take Advantage Of A Regulation's Threshold, In Order To Avoid Coming Within The Regulation's Requirements, Is Not Inherently Blameworthy

Beyond the supposed "non-innocence" of structuring because of its allegedly criminal purposes, the *Scanio* courts contend that there is something inherently wrong with attempting to get around a regulation's impact. "In requiring both that a defendant know of the reporting requirements and act to evade them, Congress insured

that the innocent and the unwitting would not be ensnared in the statutory net." *United States v. Rogers*, 962 F.2d 342 (4th Cir. 1992). In the view of these courts, acting with the intent to evade the reporting requirement is itself non-innocent behavior. To explore this contention, one should first get around the pejorative connotations of the word "evade." In the area of tax law, "evade" denotes a situation where one knows that, notwithstanding whatever tax-avoidance steps one has taken, tax is due and one fails to pay it anyway (often using various machinations to hide the fact that tax is due). To "avoid" a tax is merely to take steps that actually result in the tax not being due.

As applied by the *Scanio* line of cases, however, "willfully evading" requires no more than an intent to take one's deposits outside the purview of the reporting requirement, by causing each individual deposit to be below the reporting threshold. This definition lacks the "knowledge of impermissibility" denotation that "evasion" has in tax law, but unfortunately carries the same concept as an unspoken implication. In fact, the intent required by the *Scanio* cases could be characterized in several ways, as an intent to "evade" the regulation, to "circumvent" or "get around" it, to "frustrate it" (as the trial court below instructed the jury), or simply to "avoid its impact."

Put in these more neutral terms, the fallacy in the *Scanio* courts' premise about structuring's inherent "non-innocence" can readily be seen. An attempt to change the form of a transaction, for purposes of avoiding what would otherwise be required by regulation, is not "non-innocent behavior." It is a fact of business life in this country that much of how one conducts one's affairs is

done with an eye to regulatory or other legal impact. And since much of the law is based upon rules governed by form, frequently one will arrange the form of one's business to avoid the impact of a particular law. Whether desirable or not, this is an extremely pervasive reality. In short, *Rogers*, in the comment quoted earlier, simply begs the question: it is certainly true that structurers are not unwitting, in that they do know of the reporting requirement. 962 F.2d at 345. They may, however, be unwitting in that they may wrongly believe that for this regulation, like most others, it is permissible to rely upon and take advantage of threshold and formal requirements. For that reason, *Rogers* is quite wrong in asserting that the elements of § 5322 and § 5324(3), as interpreted by the *Scanio* cases, insure that the innocent will not be ensnared.

To take one example, come year end thousands of taxpayers will give a gift of $10,000 to someone on December 31 and another $10,000 gift on January 1. If they gave $20,000 on December 31, they would have to file a form with the IRS. 26 U.S.C. § 2503(b). In addition, at their death, their estate might be liable for additional taxes, depending on the estate's size. But by taking advantage of a "loophole" in the tax laws based upon a threshold, by manipulating the timing of their gifts to keep under the threshold, these taxpayers need not file any form. We doubt that anyone would consider these actions non-innocent, even if one might question the wisdom of the extent to which the nation's tax and regulatory structure is based on form over substance. This innocence is despite the fact that the taxpayers are taking advantage of the literal requirements of a regulation in order to avoid filing an IRS form.

How is gift structuring different from currency structuring (which also involves simply timing one's actions to keep under a threshold), in terms of their inherent innocence? We submit that the only real difference is the presumption by various appellate judges that many or most structurers are actually engaged in criminal activity, such as laundering drug money or tax evasion. But it is that underlying criminal activity, with the motive of hiding it through structuring, which is "non-innocent." Structuring performed solely with the motive of maintaining privacy is indeed innocent, even though done with the knowledge that, absent the structuring, a report would be required. It is only the knowledge that structuring is prohibited that makes it worthy of punishment.

The Ninth Circuit stated that "Defendants' confusion lay in their belief that the law would tolerate a scheme to circumvent that regulatory mechanism." *United States v. Pitner*, 979 F.2d 156, 161 (9th Cir. 1992). It is actually the Ninth Circuit which displays confusion, because the belief is widespread that the law generally tolerates taking advantage of the literal terms of a regulation. And that belief is accurate; the Pitners' mistake was a reasonable one, and the law should not ensnare those who innocently believe their conduct is permissible.

In short, many citizens, particularly those in the business world, see nothing "non-innocent" about organizing their activities to get around some particular regulation.[9]

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[9] The observation in *Dashney*, 937 F.2d at 540, that "Dashney's actions were anything but innocent, as he went to great lengths to avoid the filling out of CTRs in connection with his transactions" is a total *non sequitur*. The fact that one's method of avoiding a particular regulation happens to require going to

To suddenly bar one particular mode of organizing transactions is totally appropriate. But to make felons of those who engage in that structuring, regardless of their belief in its legitimacy and legality, is grossly unfair. This Court, applying the approach in *Liparota*, should not attribute to Congress such unjust results absent far clearer language in the statute. As the district court stated in *Aversa*:

> There are many occasions in the life of a businessman in which he structures transactions in order to avoid the impact of some regulation or tax. One may structure a company to reduce tax liability, one may structure a transaction over the course of several years to change the way a regulation affects them. If one is not trying to deprive the government of something to which the government is entitled, there is nothing illegal about such structuring. Daniel Aversa and Vincent Mento thought that this was true of the structuring of currency transactions.

Aversa, 762 F. Supp. at 446.

What possible justice is there in imprisoning an individual who, wishing to maintain financial privacy, does everything possible to ensure he is acting within the law

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great lengths says nothing about the innocence of one's actions. If an intent to avoid a regulation's impact is never innocent, that is so regardless of the simplicity of one's avoidance technique. Conversely, if such intent can be innocent, as we assert, it is no less innocent just because that particular regulation's structure may necessitate taking several steps to avoid it, especially if one has received legal advice that those steps are permissible. In any event, even if Dashney himself went to "great lengths," one need hardly go to "great lengths" to violate § 5324(3); one need simply break up more than $10,000 into two quantities and make separate deposits. To the extent there is any correlation between innocence and the simplicity of regulation-avoidance, certainly § 5324(3) encompasses quite simple behavior.

by checking with legal counsel, *Dollar Bank*, *supra*, or conferring with the bank? This is truly innocent conduct, yet the standard enunciated by the *Scanio* cases allows no such defense. *See, e.g., United States v. Hoyland*, 914 F.2d 1125, 1128 (9th Cir. 1990). *See also United States v. Jackson*, 818 F.2d 345, 346 n. 2 (5th Cir. 1987) (advice of counsel no defense if it does not negate an element of the offense).

3. The Mere Desire To Limit The Government To Only That Information It Requires Is Not Inherently Blameworthy

While acknowledging that conviction for otherwise-innocent conduct normally requires proof of an awareness of the law's requirements, *Scanio* suggests that structuring involves "bad purpose" because it entails an intent "to deprive the government of information to which it is entitled." 900 F.2d at 491. But that assumes the conclusion. Under the regulations, the government is entitled to the information only if the transaction is over $10,000. It would be more proper to say "information to which the government would be entitled, had the defendant not organized his deposits. . . . " So far as is known by someone aware of the reporting requirement, but unaware of § 5324(3), the government is no more entitled to this information than the government is entitled to gift tax returns when $20,000 is given over two days, December 31 and January 1.

It is certainly legitimate for the government to bar structuring, thereby prohibiting people from changing the form of their transactions in a way that makes the government no longer entitled to the information. But it is not correct to call it "non-innocent," and use that as a justification for eliminating a mental element, when

someone thinks he can take advantage of the specific terms of this regulation by re-organizing his activity, just as the letter of so many other laws can be used to advantage.

Welling, 41 Fla. L. Rev at 309, takes an approach similar to *Scanio*, arguing that the evade-avoid analogy to tax statutes fails because when a citizen "structures to avoid taxes, [he] saves money but still provides information to the government. In contrast, when [he] structures to avoid the bank reporting law, he denies the government information." But what is so special about regulations seeking information? How is an intent to organize one's activities around the formalities of a regulation particularly pernicious when the motive is to deny the government information? Many laws seek information for the government, including the gift tax return based upon meeting a threshold within a calendar year. Some other laws seek taxes for the government, and some have other effects. The point is that the laws have varying impacts on citizens, establishing obligations and bestowing rights. So long as those laws have formal requirements, many people will change the form of their activities to reap the maximum benefit, or suffer the minimum obligation, that the particular requirements of a particular law allow. So long as society considers such structuring to be generally acceptable, or even tolerable, the courts cannot characterize the mere desire to avoid a regulation's impact as "non-innocent," even if the impact in some cases is providing the government with information. And since no other aspect of currency structuring can fairly be called "non-innocent," it is the sort of statute where "willful" has consistently been held to require some mental state as to the law's requirements.

4. Conclusion

The discussion of "innocence" by the court below totally misses the mark:

> Finally, this case presents little risk that persons who engaged in "innocent" actions stand unjustly convicted of structuring. The Ratzlafs were aware of the reporting requirements, and the evidence indicates that the Ratzlafs apparently were seeking to avoid payment of their income taxes. The couple took no-steps to insure that the IRS would be aware of the assets used to purchase the cashiers checks; denied that they earned money from gambling when in fact they had done so; denied any failure to report gambling income; and apparently hid large amounts of currency in or near their home. The Ratzlafs cannot be compared to an individual involved in perfectly ordinary business transactions who unconsciously breaks the currency laws.

United States v. Ratzlaf, 976 F.2d 1280, 1287 (9th Cir. 1992). The first item mentioned, knowledge of the reporting requirements, alone does not establish non-innocence. Otherwise, any attempt to avoid any regulation would be non-innocent, a proposition discussed and rebutted in detail in part II.B.2 *supra*. The remaining factors, intended to suggest that the Ratzlafs were evading taxes and lying to the government, may establish non-innocence on the Ratzlafs' part. But they hardly establish that *no* structurers act innocently. Those who are not trying to evade taxes, who act only out of privacy or other personal motivations, are indeed comparable to ordinary business transactors.

As discussed earlier, this Court, when determining the elements of 7 U.S.C. § 2024(b) in *Liparota*, did not rely

on the apparently fraudulent activity of Liparota himself, when he sold food stamps to an undercover investigator for below face value. Instead, this Court recognized that it was determining the elements of that statute for *all* prospective defendants and looked to what kinds of behavior might be encompassed by the statute.[10]

Unfortunately, the *Scanio* cases have analyzed § 5322 and § 5324(3) in a one-sided manner: when the particular defendant appeared to be engaged in other criminal activity, the courts have emphasized that fact in determining the elements of the crime. But in other cases such circumstances were lacking. And at times, the defendants in those cases acted on advice of the bank or counsel that § 5324(3) was, like most regulations, one which could be avoided by making sure not to exceed its threshold. In these latter cases, the courts have applied the same unforgiving elements of the crime as in the former cases, thus leading to the criminalization of otherwise-innocent behavior.

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[10] That analysis was conducted in the face of a dissent that characterized the examples as "bizarre mutation[s]," "wholly academic" hypotheticals presuming "wildly unreasonable conduct by government officials." 419 U.S. at 437 n. 3 (White, J. dissenting). As to § 5324(3), however, there is no question that the government has prosecuted people uninvolved with illegal activity and with a good faith belief their conduct was lawful. See part II.B.1 *supra*. Thus, even if this Court were to exclude academic hypotheticals, as suggested by the *Liparota* dissent, it is clear that § 5324(3) encompasses behavior that is innocent, absent knowledge of the prohibition of structuring.

III. DEPOSITORS OF CASH ARE NOT ON NOTICE OF THE LIKELIHOOD THAT ORGANIZING THE SIZE OF THEIR DEPOSITS IS THE SUBJECT OF REGULATION

Another thread to the courts' interpretation of "willful" is whether an individual is on notice of the likelihood of regulation.

> The primary purpose of the law, and the criminal law in particular, is to conform conduct to the norms expressed in that law. When there is no knowledge of the law's provisions, and no reasonable probability that knowledge might be obtained, no useful end is served by prosecuting the "violators."

United States v. Mancuso, 420 F.2d 556, 559 (2d Cir. 1970). This is closely related to the "otherwise-innocent" question, since if one is aware that his behavior is regulated, his violation of the regulation cannot be deemed "innocent."

Those *Scanio* courts considering this question have concluded that violators of § 5324(3) are indeed put on notice of the likelihood of regulation. The most detailed discussion is in *Scanio* itself, after a reference to *Mancuso*:

> In the present case, however, Scanio was not prosecuted for having failed to comply with an obscure reporting requirement; he was charged with having intentionally structured a currency transaction with the explicit purpose of evading what he knew to be the bank's legal duty to file CTRs for all transactions exceeding $10,000. Scanio engaged in affirmative conduct and demonstrated an awareness of the legal framework relative to currency transactions which, it is reasonable to conclude, should have alerted him to the consequences of his conduct.

900 F.2d at 490. That argument, however, utterly fails. The only "awareness of the legal framework" necessarily demonstrated by one who structures is knowledge that, if he deposits more than $10,000 at one time, a report must be filed. That knowledge would hardly alert one to the existence of the ban on structuring in § 5324(3).

Using *Scanio's* logic, every single regulation in this country puts one on notice of the potential that attempts to circumvent that regulation might be prohibited. But as we discussed at length in part II.B.2, much of the business world is devoted to changing the form of a transaction to take advantage of how that transaction's form implicates a regulation or not. In fact, most regulations are not subject to a bar on seeking to avoid them. We submit that most people would heartily reject the notion that every time there is a regulation, they are on notice of the likelihood that for that regulation, unlike most others, one cannot change the form of one's transactions to benefit from the letter of the regulation.

Following the discussion quoted above, *Scanio* cites to *United States v. International Minerals & Chemical Corp.*, 402 U.S. 558 (1971). There is no justification for the *Scanio* court to draw an analogy between the depositing of cash and the transportation of dangerous chemicals involved in *International Minerals*. With hazardous materials, one is on effective notice that one's behavior is subject to detailed regulation; the same cannot be said of bank deposits. In fact, in *International Minerals* the transporter was required by law to be familiar with the various regulations, 402 U.S. at 569 and n. 4 (Stewart, J. dissenting).

A similarly unwarranted analogy was drawn in *Hoyland*, the precedent on which the decision below relied.

The Ninth Circuit observed that "[t]he statute is like the narcotics statutes construed in *Balint* [*United States v. Balint*, 258 U.S. 250 (1922)] and *Behrman*, [*United States v. Behrman*, 258 U.S. 280 (1922)] *supra*; intent to do the act suffices." 914 F.2d at 1129-1130. If the court was only stating that its holding regarding § 5322's mental elements makes the statute comparable to the narcotics statutes, the comment is unedifying. If instead the court was asserting that the anti-structuring statute is like narcotics statutes and *therefore* intent to do the act suffices, its premise is significantly flawed. In just what way is cash like narcotics?

Welling, 41 Fla. L. Rev at 316-318, contains a more extensive discussion of the "likelihood of notice" issue than any of the *Scanio* cases do. Although she ultimately concludes that knowledge of the ban on structuring is not an element of the crime, part of her discussion in fact rejects these points made by the *Scanio* and *Hoyland* courts. As she states, one relevant factor is whether the field involved "a highly regulated substance like alcohol." She concedes that "[r]egulation of cash transactions is not as pervasive." Similarly, the nature of the substance is relevant, because dangerous items, such as firearms or toxic substances, are known to be regulated. "[T]he basic commodity of the anti-smurfing law is cash transactions, which are difficult to put in the specialized category with acid and toxic waste." *Id.* at 313.

Welling makes three points that supposedly show that a defendant will know of a high likelihood of regulation. The first is that structuring is "not morally pure" and therefore known to be subject to regulation. But the premise underlying this assertion is that structuring "arises only in the wake of an effort to evade another

law," *id.* at 317, a contention we debunked in part II.B.2. The second point is the same as *Scanio's* fallacy, namely that knowledge of the reporting requirement should lead to knowledge of the ban on structuring. A related contention is that someone contemplating structuring "should question whether such easy evasion is too good to be true." Welling, 41 Fla. L. Rev at 318. One could as easily say that of any regulation with a threshold or some means by which its impact can readily be avoided. Are business people on notice that every regulation which can be circumvented easily, instead of through expensive and complex means, in fact may not be circumvented? Welling's assertion is simply nonsensical.

IV. THIS COURT'S DECISION IN *CHEEK V. UNITED STATES* HAS NO RELEVANCE TO WHETHER IN A PARTICULAR NON-TAX CRIMINAL STATUTE, "WILLFULNESS" REQUIRES KNOWLEDGE OF THE LAW'S PROVISIONS

In *Cheek v. United States*, 498 U.S. 192 (1991), this Court looked at the meaning of "willfully" under 26 U.S.C. §§ 7201 and 7203 of the tax code. It was already well-established that the term, as used in those statutes, required proof of a voluntary, intentional violation of a known legal duty. *Id.* at 201. The only question before this Court in *Cheek* was whether an objectively unreasonable misunderstanding of the law constituted a defense to that mental element. *Id.*

In the course of introducing the issue before it, this Court in *Cheek* noted "[t]he general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution. . . . " *Id.* at 199. Several of the post-*Cheek* decisions have seen this as a holding that knowledge of

the law's requirements is non-existent, or at most a rarity, outside the criminal tax laws. The tenor of the opinions is that if the crime of structuring is distinguishable from tax offenses, then it certainly does not require knowledge of the law's requirements. But the numerous decisions interpreting non-tax crimes, across a very broad range of types of statutes, refutes any such suggestion. Surely this Court was not *sub silentio* reversing the literally scores of decisions, analyzing literally dozens of statutes, that have concluded there was some mental element regarding the requirements of a particular (non-tax) law.

The *Scanio* cases which discuss *Cheek* are reading far too much into it by finding therein promulgation of a *rule* of statutory construction, where in fact this Court was merely *generalizing* about statutes not then in issue. Thus, *amicus* is not asking, as contended in *Rogers*, "that the interpretation of 'willful' in the tax laws should be extended to this offense." 962 F.2d at 344. Rather, we are asking that this Court apply the traditional definition of "willfully," that found in numerous other non-tax statutes, especially those involving otherwise-innocent behavior.

Some of the *Scanio* courts conclude that *Cheek* is distinguishable because the currency regulations are not comparable to the tax laws in their complexity. *Pitner*, 979 F.2d at 161; *Ratzlaf*, 976 F.2d at 1284, 1285; *Rogers*, 962 F.2d at 344. Certainly in the tax arena, the complexity of the law has been a major motivating factor behind the court's conclusion that knowledge of the regulation is an element of the offense. *Cheek*, 498 U.S. at 199-200. But the cited cases are in effect holding that willfulness does not entail knowledge of the law's requirements *unless* the regulatory scheme is highly complex. That assertion does not

follow logically from cases such as *Cheek*, nor is it an empirically correct statement about the law.

The belief that it is unfair to prosecute in a complex regulatory scheme, absent knowledge of the regulation, does not logically support the conclusion that knowledge of a regulation is an element *only* when there is a complex scheme. In fact, the courts have frequently found a knowledge of the law element when the regulatory scheme was actually quite simple. The most obvious example is in the very statute under review here, § 5322, where every circuit to address the issue had concluded that to willfully violate § 5316 requires knowledge of the reporting requirement. The requirement to declare more than $10,000 in currency when crossing the border is hardly complex. Nor is the law requiring 18 year old males to register with the Selective Service. *United States v. Kerley*, 838 F.2d 932, 936 (7th Cir. 1988).

The post-*Cheek Scanio* decisions, in concluding that *Cheek* actually supports their position, note that *Cheek* was predicated in part on protecting innocent behavior, whereas these courts viewed structuring as non-innocent. *Pitner*, 979 F.2d at 160; *Ratzlaf*, 976 F.2d at 1284; *Dashney*, 937 F.2d at 540. We discussed at length in part II.B this mistaken assertion that structuring cannot be undertaken innocently. In a related point, *Pitner* distinguished *Cheek* because *Cheek* involved a defense of good faith mistake regarding the law's requirements, whereas Pitner did not raise that defense. 979 F.2d at 160 n. 4. However, the standard enunciated in *Pitner* and the other *Scanio* cases allows no good faith defense, even for those individuals whose belief that the reporting requirements may lawfully be avoided comes from the advice of lawyers or bank employees.

As noted earlier, the concept of "ignorance of the law" as a defense is a source of much confusion. It is worth quoting in detail the comments in *United States v. Golitschek*, 808 F.2d 195 (2d Cir. 1986), regarding the maxim "ignorance of the law is no excuse."

> To put the matter more generally, a defendant normally need not be shown to know that there was a law that penalizes the offense he is charged with committing. However, he must be proven to have whatever state of mind is required to establish that offense, and sometimes that state of mind includes knowledge of a legal requirement. . . . When we say that ignorance of the law is no excuse, or, as was said in this case, that everyone is presumed to know the law, we mean only the law that makes the offense punishable, not the law that in some circumstances sets out legal requirements that must be known in order to have committed the offense. The distinction is not the less vital because it is subtle.

808 F.2d at 202-203.

Amicus does not contend that structuring defendants must be proven to have knowledge that § 5322 makes structuring punishable. But they must be shown to have knowledge of § 5324(3)'s requirement, namely that one not structure his transactions in an attempt to escape § 5313's reporting requirement. For all the reasons discussed above and in Petitioners' brief, Congress's choice of the term "willfully" in § 5322 is a clear indication that it required proof of that mental element.

V. CONCLUSION

Amicus believes that this case may have significance far beyond prosecutions under § 5324(3). It is one of the

rare occasions in which this Court confronts the issue of when a good faith ignorance of the law's requirements may be a defense to a crime.

In an era when all or most of the laws reflected society's norms, the issue was of little significance. Almost any person violating the law had made a conscious choice to engage in blameworthy conduct, and it was fair to put the risk upon him that he was wrong about the law's ambit.

But today, the reach of regulatory statutes touches every facet of people's lives. Behavior that is legal one day suddenly becomes illegal, and punishable by years in prison, with no effective notice. It would be grossly unfair to say that people act at their peril regarding the legality of their activity, when their conduct is comparable to other, totally legal actions taken in the business world every single day. The unfairness increases when a person contemplating such conduct makes a good faith inquiry into the law's provision, but happens to receive mistaken advice. *Amicus* submits that Congress fully recognized the risk that the currency laws could reach innocent behavior and therefore erected "willfulness" in § 5322 as an added protection beyond the intent elements of the various requirements and prohibitions. That protection applies just as much as structuring under § 5324(3) as to other violations of the currency laws. The decision of the court below should be reversed.

Respectfully submitted,

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